91-1757

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TIMOTHY DALE BUNCH,
Petitioner,

v.

CHARLES E. THOMPSON, Warden,
MECKLENBERG CORRECTIONAL CENTER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit departed from rulings of this Court when it failed to apply the rule announced in *Edwards v. Arizona* to a petitioner whose conviction became final more than two years after *Edwards* was decided, and it ignored the clear mandate of *Edwards* that an accused who has asserted his right to counsel is not subject to further interrogation unless he initiates further communications with the police.

2. Whether the Fourth Circuit's conclusion that the mere restatement of the *Edwards* rule in *Solem v. Stumes* constituted a new rule conflicts with this Court's prior rulings and misapplies settled retroactivity principles.

RULE 28.1 LIST OF PARTIES

The parties to this proceeding and the proceedings below are the petitioner, Timothy Dale Bunch, and the respondent, Charles E. Thompson, Warden of Mecklenberg Correctional Center. Respondent has at all times been represented by the Office of the Attorney General of the Commonwealth of Virginia.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Timothy Dale Bunch, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on January 31, 1992. In addition, petitioner respectfully submits that a summary reversal of the Fourth Circuit's decision is warranted in this case. Petitioner is currently under sentence of death in the Commonwealth of Virginia.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit and the dissent are reported at 949 F.2d 1354 and reprinted in the Appendix hereto ("App. at ——"). The Fourth Circuit's denial of rehearing (2-1) and rehearing *en banc* (8-4) is not reported but is reprinted in the Appendix.

The memorandum decisions of the United States District Court for the Eastern District of Virginia (Spencer, J.) have not been reported, but are reprinted in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The judgment and opinion of the Fourth Circuit was rendered on November 27, 1991. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by the Fourth Circuit on January 31, 1992. Accordingly, the time for filing this petition expires on April 30, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Constitutional provisions:

a. The Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

b. The Fourteenth Amendment to the United States Constitution, Section 1, which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Prior Proceedings

On August 11, 1982, Timothy Dale Bunch was convicted of capital murder in the Circuit Court of Prince William County, Virginia. The trial judge affirmed the sentence of death on November 12, 1982. The Virginia Supreme Court affirmed the conviction and sentence on June 17, 1983. *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983), *cert. denied*, 464 U.S. 977 (1983), *reh'g denied*, 464 U.S. 1064 (January 9, 1984). On September 26, 1983, the Supreme Court of Virginia stayed the execution of judgment pending further order of that court.

On February 27, 1984, Bunch filed a writ of habeas corpus in the Circuit Court of Prince William County, Virginia. The Circuit Court denied Bunch's requested relief on May 28, 1985.

Bunch filed a notice of appeal with the Court of Appeals of Virginia. An order staying the execution pending further proceedings was signed by Judge Thornton on August 2, 1985. On July 6, 1987, the Court of Appeals of Virginia dismissed the appeal for lack of jurisdiction based on *Peterson v. Bass*, 2 Va. App. 314, 343 S.E.2d 475 (1986).

On August 4, 1987, Bunch filed a petition for appeal in the Supreme Court of Virginia. The Virginia Supreme Court, upon consideration of all briefs filed, refused the petition for appeal on February 26, 1988, without stating the grounds for its decision.

On October 6, 1988, Bunch filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia (Richmond Division). The Commonwealth's motion to dismiss the petition was granted in the District Court's Memorandum Opinion dated March 16, 1990.

On March 30, 1990, Bunch filed a motion to alter or amend the March 16, 1990 judgment. Bunch's motion was denied in the District Court's Memorandum Opinion dated June 4, 1990, and Bunch noted his appeal on June 19, 1990.

On September 21, 1990, Bunch filed his brief to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit rejected Bunch's claims in a 2-1 decision issued on November 27, 1991. Bunch filed a timely petition for rehearing and suggestion for rehearing *en banc* on December 10, 1991. The Fourth Circuit denied rehearing (2-1) and rehearing *en banc* (8-4) on January 31, 1992.

B. Statement of Facts

The facts underlying Bunch's claims are undisputed. On January 31, 1982, Su Cha Thomas was killed. Shortly thereafter, Bunch became a suspect in Ms. Thomas's death. Virginia authorities [1] travelled to Japan, where Bunch was serving as a sergeant in the United States Marine Corps, to interview him. During the interview, Bunch requested counsel.

At the hearing on Bunch's motion to suppress statements made in Japan, Bunch testified that he repeatedly requested counsel. The Virginia authorities testified that Bunch mentioned the need for counsel on only one occasion, and that he stated, "he might want to talk to an attorney." The trial court specifically rejected the testimony of the Virginia authorities, and found unconditionally that Bunch had requested counsel:

> I have no question in my mind somewhere along the interview he [Bunch] indicated the feeling that he

[1] The Virginia authorities who interviewed Bunch in Japan were Donald L. Cahill, Criminal Investigator for the Prince William County Police Department, and Assistant Commonwealth Attorney for Prince William County, William D. Hamblen.

> should have an attorney present, and at that point red flags should fly up everywhere. The whole machine should go tilt particularly, with an attorney, a Commonwealth attorney sitting in there.

(A. 118).

Despite Bunch's request for counsel, the investigators continued to question him. The trial court ruled that the continued questioning of Bunch after his assertion of his right to counsel required the suppression of all statements made by Bunch in Japan. *Bunch v. Commonwealth*, 304 S.E.2d 271, 274-275 (Va. 1983). The trial court's factual finding that Bunch requested and was denied his right to counsel is presumed to be correct in this Court, *see* 28 U.S.C. § 2254(d), and is amply supported by the record.

Bunch was transported from Japan to Quantico, Virginia in the custody of military personnel. Bunch was not given the opportunity to consult with an attorney during his thirty-six hour journey from Japan to the United States. Upon his arrival at Quantico, Bunch was processed for delivery to Prince William County authorities. At Quantico, Bunch had a brief meeting with a Major Jillisky, a Marine Corps civil lawyer. The purpose of the meeting was to inform Bunch of his transfer to civilian authorities. Jillisky specifically informed Bunch that he was not his attorney, and the trial court found that the conference did not satisfy Bunch's right to counsel. Despite the fact that Bunch had yet to confer with a lawyer, Officer Cahill, who had been with Bunch when he asserted his right to counsel in Japan, reopened the questioning while the two were en route to the Prince William County Substation. He "asked Bunch if he felt he was ready to sit down and go over the case." *Id.* at 275. In response, Bunch made several incriminating statements.

At the 1982 hearing on the motion to suppress the statements made in Virginia, Bunch's trial counsel argued that this Court's decision in *Edwards v. Arizona*, 451

U.S. 477 (1981) controlled, and that *Edwards* required that the statements made by Bunch in response to Cahill's reinitiation of questioning be suppressed. The prosecution, relying on Justice Powell's concurrence in *Edwards*, argued that *Edwards* did not require suppression. The trial court ignored the first prong of the two-step inquiry established in *Edwards*, *i.e.*, the requirement that after a request for counsel has been made, a valid waiver must be based on a finding that it was the accused who further initiated conversations with police. Instead, the court simply found that under the totality of circumstances, Bunch waived his previously invoked right. (A. 126-161). The trial court never addressed the question of who initiated the second colloquy.

C. The Fourth Circuit's Decision

Bunch maintains that the statements made in Virginia should have been suppressed under *Edwards*,[2] and in his dissenting opinion, Judge Sprouse of the Court of Appeals for the Fourth Circuit agreed.

Despite the fact that *Edwards* was decided well before Bunch's conviction became final, the Fourth Circuit majority held that since the "question on which the Virginia Supreme Court ruled was 'susceptible to debate among reasonable minds' at the time," *Bunch v. Thompson*, 949 F.2d at 1359, App. at 6a, a reversal of Bunch's case on collateral review would violate the "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288 (1989) and *Butler v. McKellar*, 110 S. Ct. 1212 (1990). *Id.* The court strained to apply the new rule doctrine to Bunch's case by reasoning that while *Edwards* "seems clear today," *id.* at 1360, App. at 7a, the "holding was not universally clear to state courts" at the time, and that the Virginia Supreme Court's opinion "must be considered a reasonable application of that case." *Id.* at 1361, App. at 10a. The two-judge majority implied that it took this

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[2] Bunch has raised this issue at every stage of his case, and thus, there is no issue of procedural default.

Court's decision in *Solem v. Stumes*, 465 U.S. 638 (1984), to establish the clarity of *Edwards*, and it deemed the reiteration of the *Edwards* rule in *Solem* to be a "new rule" which it declined to apply retroactively to Bunch's case. *Bunch, supra*, 449 F.2d at 1360, App. at 7a.

In his dissent, Judge Sprouse rejected the majority's approach:

> It is the majority's view that not until *Solem* was *Edwards* clarified as establishing "a bright-line rule that before a suspect can waive his invoked right to counsel he must be the party to initiate subsequent communication."
>
> In my view, the bright-line rule was clearly announced in *Edwards*. *Solem* did not alter or modify the *Edwards* rule. Since the parameters of the waiver of counsel requirements were established in *Edwards*, consideration of *Teague's retroactivity* principle is simply misplaced.

Id. at 1368, App. at 23a-24a.

Judge Sprouse recited the plain language of *Edwards* and traced the history of the decisions which followed, including *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) in which "eight members of the Supreme Court restated that the waiver ruling in *Edwards* was absolute." *Bunch, supra*, 949 F.2d at 1368, App. at 25a. Judge Sprouse disputed the majority's characterization of *Solem* as a "new rule," since "it neither extended nor modified *Edwards*." *Id.*, App. at 26a. While the majority insisted that the Virginia Supreme Court, prior to *Solem*, could have reasonably interpreted *Edwards* to permit Officer Cahill's reinterrogation of Bunch, Judge Sprouse maintained:

> Not even in the most generous recognition of comity . . . could we suggest that a state court's interpretation of a United States Supreme Court decision on federal constitutional law is reasonable when the United States Supreme Court has reached a contrary conclusion.

> . . . [I]f the majority of the Supreme Court holds the *Edwards* opinion to be clear—it is clear.

Id. at 1369-70, App. at 27a. Finally, Judge Sprouse explained that the concerns for the administration of criminal justice in state courts embodied in *Teague* would in fact be frustrated by the majority's approach:

> The majority opinion here . . . would interpret *Teague* as allowing lower courts to render a clear decision of the Supreme Court unclear; the result produces the very lack of finality the majority panel here decries.

Id. at 1370, App. at 28a.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Petitioner's Fifth Amendment claim is based on this Court's 1981 decision in *Edwards v. Arizona*, *supra*. Petitioner submits that a reading of *Edwards*, the Fourth Circuit's majority opinion rejecting his claim, and Judge Sprouse's dissent establishes several reasons why this Court should grant certiorari and consider summary reversal of the Fourth Circuit's ruling.

Specifically, petitioner submits that the majority's reasoning and conclusion are fundamentally flawed and that certiorari and summary reversal are proper for the following reasons:

1. The majority's characterization of *Edwards* as vague is flatly inconsistent with the plain language of *Edwards* and this Court's reaffirmations of its 1981 decision. *See Wyrick v. Fields*, 459 U.S. 42, 45-46 (1982) (*Edwards* "held that once a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is provided unless the suspect himself initiates dialogue with the authorities"); *Oregon v. Bradshaw*, 462 U.S. at 1054, n.2 (1983) (noting that eight justices agree that *Edwards* created a *per se* rule); *Solem*

v. Stumes, 465 U.S. at 646 (*Edwards* established a *per se* rule); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) ("*Edwards* set forth a bright-line rule that all questioning must cease after an accused requests counsel"); *Michigan v. Jackson*, 475 U.S. 625, 634 (1986) ("one of the characteristics of *Edwards* is its clear, bright-line quality"); *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) ("surely there is nothing ambiguous about the holding in *Edwards*"); *Minnick v. Mississippi*, 111 S. Ct. 486, 490 (1990) ("the merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application").[3]

2. The majority's conclusion that retroactivity principles preclude petitioner from benefiting from the rule in *Edwards* runs counter to this Court's direction in *Shea v. Louisiana*, 470 U.S. 51 (1985), that *Edwards* should be applied to all defendants whose convictions became final after May 18, 1981, the date on which *Edwards* was decided. It is undisputed that petitioner's conviction did not become final until more than two years *after Edwards* was decided.

3. The majority's conclusion that *Solem v. Stumes*, *supra*, established a "new rule" is similarly inconsistent with this Court's prior rulings, and it distorts settled retroactivity principles. *Solem v. Stumes* concerned the retroactivity of the *Edwards* rule. The Court repeated the rule, but did not clarify or modify *Edwards*. *See Michigan v. Jackson*, 475 U.S. at 626 ("[i]n *Solem v.*

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[3] Indeed, the majority's characterization of *Edwards* as unclear was inconsistent with the Fourth Circuit's own prior rulings. *See United States v. Renda*, 567 F. Supp. 487, 488, *aff'd*, 758 F.2d 649 (4th Cir. 1985) ("*Edwards* is a *per se* rule"); *Wilson v. Murray*, 806 F.2d 1232, 1237 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987) (*Edwards* constructed a prophylactic rule of considerable impermeability); *McFadden v. Garraghty*, 820 F.2d 654, 658 (4th Cir. 1987) ("*Edwards* set down a rigid prophylactic rule"). The majority opinion does not address these cases, although all were cited below by the petitioner.

Stumes we reiterated that *Edwards* established a bright-line rule to safeguard pre-existing rights").

Petitioner submits that a grant of certiorari and summary reversal is especially proper in light of this Court's continuing insistence upon adherence to the *Edwards* rule, *see Minnick, Roberson, Jackson, Smith, Solem, Bradshaw, Wyrick* and *Edwards*, and because of the lower court's improper use of retroactivity and "new rule" principles. *See Stringer v. Black*, 112 S. Ct. 1130, 1134 (1992) (since case relied upon by petitioner did not "break new ground," it did not announce a new rule, and Supreme Court reversed Fifth Circuit's improper application of new rule doctrine).

I. THE FOURTH CIRCUIT IGNORED PRIOR RULINGS OF THIS COURT WHEN IT FAILED TO APPLY THE CLEAR RULE ANNOUNCED IN *EDWARDS v. ARIZONA* TO A PETITIONER WHOSE CONVICTION BECAME FINAL MORE THAN TWO YEARS AFTER *EDWARDS* WAS DECIDED.

A. This Court Should Grant Certiorari Because, At The Time Petitioner's Conviction Became Final, It Was Clear That *Edwards* Established A *Per Se* Rule.

The Fourth Circuit majority concluded that at the time the Virginia Supreme Court decided petitioner's claim, the meaning of *Edwards* was unclear. *Bunch v. Thompson*, 949 F.2d at 1360, App. at 7a. The operative date for deciding whether the *Edwards* holding applies to Bunch is not the date on which the Virginia Supreme Court decided his appeal, but rather the date on which his conviction became final, *i.e.*, when this Court denied his petition for certiorari on direct review of his state conviction—January 9, 1984. *See Stringer v. Black*, 112 S. Ct. at 1134 ("Petitioner's conviction became final when we denied certiorari."). This Court has repeatedly told lower courts that *Edwards* established a "bright-line rule," and at the time petitioner's conviction became final, it was clear that *Edwards* established a *per se* rule.

Prior to the decision in *Edwards*, the standard for determining whether a suspect in custody had waived his previously asserted right to counsel was whether, under the totality of circumstances, the suspect knowingly and intelligently waived his right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The decision (6-3) in *Edwards* changed the standard for waiver under those circumstances. The Court stated unconditionally:

> We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has [again] been advised of his right. We further hold that *an accused* . . . having expressed his desire to deal with police through counsel, *is not subject to further interrogation* by the authorities until counsel has been made available to him, *unless the accused himself initiates* further communication, exchanges or conversations with the police.

Edwards, 451 U.S. at 484-85 (emphasis added).

The holding in *Edwards* was neither ambiguous nor equivocal. Indeed, the *Edwards* Court left no doubt as to what it meant when it added that any finding of a valid waiver must include "the *necessary* fact that the accused, not the police reopened the dialogue with the authorities." *Id.* at 486 and n.9.

After *Edwards*, once it has been established that the accused invoked his right to counsel, courts must undertake a two-step inquiry to determine whether the accused subsequently waived that right. First, the accused must be found to have initiated later conversations with the police, and second, it must be clear from the totality of circumstances that the accused knowingly, voluntarily and intelligently waived his right to counsel. Therefore, under *Edwards*, an accused who has not reinitiated communication with the police cannot be found to have waived

his right to counsel. *See Smith v. Illinois*, 469 U.S. at 95 (if the accused invoked his right to counsel, courts may admit his responses to further questioning *only* on finding that he (a) initiated further discussions with police, *and* (b) knowingly and intelligently waived the right he had invoked) (emphasis added).

A majority of this Court reaffirmed the clear holding of *Edwards* in two decisions rendered prior to the date on which petitioner's conviction became final. In *Wyrick v. Fields*, 459 U.S. at 45-46,[4] this Court repeated its holding in *Edwards*:

> In *Edwards*, this Court had held that once a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is provided unless the suspect himself initiates dialogue with the authorities.

In *Oregon v. Bradshaw*, *supra*, eight Justices agreed that *Edwards* altered the *Zerbst* standard of waiver and hence established a *per se* rule. *Bradshaw*, 462 U.S. 1054 and n.2. Thus, prior to the date on which petitioner's conviction became final, a majority of this Court held *Edwards* to be clear.

Decisions of this Court rendered after petitioner's conviction became final confirm that a majority of the Court has always regarded *Edwards* as being clear and unequivocal. For example, in *Smith v. Illinois*, 469 U.S. at 95 (1984), the Court remarked that "*Edwards* set forth a bright-line rule that all questioning must cease after an accused requests counsel." In *Michigan v. Jackson*, 475 U.S. at 634 (1985), the Court stated that "one of the characteristics of *Edwards* is its clear, bright-line quality."

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[4] In *Wyrick*, the Court reversed an Eighth Circuit decision because it went beyond *Edwards* and fashioned another *per se* rule of its own, requiring the police to advise a suspect of his rights a second time notwithstanding a voluntary and intelligent waiver. *Wyrick*, 459 U.S. at 48.

Similarly, in *Arizona v. Roberson*, 486 U.S. at 682 (1988), the Court emphasized that the *Edwards* rule serves the purpose of providing "clear and unequivocal guidelines to the law enforcement profession." Most recently, in *Minnick v. Mississippi*, 111 S. Ct. at 490 (1990), the Court noted that "the merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." [5]

As this Court stated in *Roberson* and as petitioner contends:

> Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communications, exchanges or conversations with the police.

Arizona v. Roberson, 486 U.S. at 682. The Fourth Circuit's opinion ignores the consistent holdings of this Court.

Finally, the Fourth Circuit's ruling its flatly inconsistent with its own decisions holding *Edwards* to be clear. *See United States v. Renda*, *supra*, n.3, 567 F. Supp. at 489 (*Edwards* is a *per se* rule); *Wilson v. Murray*, *supra*, n.3, 806 F.2d at 1237 (*Edwards* constructed a prophylactic rule of considerable impermeability); *McFadden v. Garraghty*, *supra*, n.3, 820 F.2d at 658 (accord). *Bunch* relied on these cases below, but the majority opinion did not cite or attempt to distinguish these decisions.

The *McFadden* case is particularly significant because there, the Fourth Circuit applied the *per se* rule of

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[5] The Fourth Circuit's conclusion that *Edwards* was vague is based entirely on the concurring opinions of Justice Powell in *Edwards* and *Bradshaw*. It is axiomatic, as Judge Sprouse stated in his dissenting opinion, that one Justice's opinion cannot countermand the law set forth in a decision of the Court.

Edwards to an appellant whose conviction became final nine months *before* Bunch's conviction became final. *McFadden*, 820 F.2d at 655-56. The Fourth Circuit applied *Edwards* to that appellant's claim that his confession was obtained in violation of his Fifth Amendment privilege. *Id.* at 657-58. The *McFadden* court made no reference to the *Solem v. Stumes* decision because it recognized that *Edwards* established a "rigid prophylactic rule," and that under *Edwards*, courts must "first determine whether the accused actually invoked his right to counsel." *Id.* at 658. "If the accused invoked his right to counsel, courts may admit his responses only on finding that he (a) initiated further discussions with the police, *and* (b) knowingly and intelligently waived the right he had invoked." *Id.* Thus, in *McFadden*, the Fourth Circuit applied *Edwards* in the very manner urged by Bunch.

Bunch's conviction became final *after* that of the appellant in *McFadden*. Despite this fact, the Fourth Circuit majority in Bunch's case ignored *McFadden* and constructed a flawed retroactivity argument in order to avoid the consequences of *Edwards*. Bunch submits that the Fourth Circuit's decision departs from prior rulings of this Court and directly conflicts with its own precedent. Certiorari should be granted.

B. This Court Should Grant Certiorari Because The Fourth Circuit's Decision Is Inconsistent With This Court's Decision In *Shea v. Louisiana*, Which Conclusively Establishes That Petitioner Is Entitled To The Benefit Of *Edwards*.

Any doubts as to whether the rule established in *Edwards* applies to petitioner, and any doubts as to whether federal courts are bound to reverse when *Edwards* has been misapplied, have been resolved by this Court's decision in *Shea v. Louisiana*, *supra*. The issue in *Shea* was whether *Edwards* should be applied to cases which were pending on direct appeal at the time *Edwards*

was decided. *Shea*, 470 U.S. at 52. The Court held that *Edwards* applies to those defendants whose convictions had not already become final before *Edwards* was decided. *Id.* at 58-59.[6]

Edwards was decided on May 18, 1981. *See Edwards, supra.* Petitioner's conviction was affirmed on appeal on June 17, 1983, and it became final on January 9, 1984. *See Bunch v. Commonwealth, supra.* Under *Shea*, because petitioner's conviction was not final before *Edwards* was decided, he is entitled to the full benefits of that ruling. Although petitioner relied upon the case below, the Fourth Circuit ignored *Shea*, and certiorari is warranted.

C. Officer Cahill Reinitiated Conversation With Petitioner.

The trial court looked only at the totality of the circumstances and did not address the question of whether it was Officer Cahill who initiated the conversation leading to the incriminating statements made in Virginia when he asked Bunch "if he felt ready to sit down and go over the case." After concluding that *Edwards* did not establish a *per se* rule, the Virginia Supreme Court summarily noted that Cahill's question amounted to "nothing more than an effort to ascertain if Bunch had changed his mind." *Bunch v. Commonwealth*, 304 S.E.2d at 277. The

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[6] *Shea* has been consistently applied in other circuits. *See Simpson v. Commonwealth of Massachusetts*, 795 F.2d 216, 219 (1st Cir. 1986), *cert. denied*, 479 U.S. 1020 (1986); *Diaz v. Scully*, 641 F. Supp. 1037 (S.D.N.Y. 1986), *aff'd*, 821 F.2d 153, 156 (2d Cir. 1987), *cert. denied*, 489 U.S. 933 (1987); *Vogel v. Commonwealth of Pennsylvania*, 790 F.2d 368, 380 n.6 (3d Cir. 1986); *Butler v. Aiken*, 846 F.2d 255 (4th Cir. 1988); *Esquivel v. McCotter*, 791 F.2d 350 (5th Cir. 1986); *Flournay v. Marshall*, 842 F.2d 875, 878 (6th Cir. 1988); *United States Ex Rel. Adkins v. Greer*, 791 F.2d 590, 595 (7th Cir. 1985), *cert. denied*, 479 U.S. 989 (1986); *Greenwalt v. Ricketts*, 784 F.2d 1453, 1456 (9th Cir. 1986), *cert. denied*, 479 U.S. 980 (1986); *Andrews v. Shulsen*, 802 F.2d 1257, 1271 (10th Cir. 1986), *cert. denied*, 485 U.S. 919 (1988); *Cervi v. Kemp*, 855 F.2d 702, 705 and n.9 (11th Cir. 1988).

Fourth Circuit majority again failed to apply the *Edwards* two-pronged inquiry and stated that the Virginia Supreme Court's view "under *Edwards* was a reasonable application of that case." *Bunch*, 949 F.2d at 1360; App. at 10a.

First, whether the Virginia Supreme Court's opinion was a "reasonable application" of the *Edwards* test is irrelevant. The constitutional effect of Cahill's question is a legal question and, as such, is subject to the independent review of this Court. *See Rhode Island v. Innis*, 446 U.S. at 298-302; *Miller v. Fenton*, 474 U.S. 104, 112 (1985). The Virginia Supreme Court's finding is not entitled to any deferrence even if it was "reasonable" or grounded in good faith. The majority below disregarded its duty to determine whether the Virginia court was right or wrong as a matter of federal constitutional law.

Second, the opinions of the Virginia Supreme Court and the Fourth Circuit ignore the government's heavy burden to demonstrate waiver. Courts will "indulge very reasonable presumption against waiver of fundamental constitutional rights," *Zerbst*, 304 U.S. at 464, and "doubts must be resolved in favor of protecting the constitutional claim." *Michigan v. Jackson*, 475 U.S. at 633 (1986).

Finally, *Edwards* implements the *Miranda* bar on interrogation after the right to counsel has been asserted by requiring that questioning may not resume unless it is the accused who initiates further "communications, exchanges, or conversations" with the police. *Edwards*, 451 U.S. at 484-85. Thus, the fact that Cahill initiated the "exchange" required the trial court to find an *Edwards* violation. As Judge Sprouse remarked in his dissent, "clearly Cahill, not Bunch, initiated the conversation leading to the subsequent interrogation at the Prince William County police station." *Bunch*, 949 F.2d at 1370, App. at 28a. The conclusion of Judge Sprouse is consistent with the clear directive of *Edwards* that any change of

heart must first be voiced by the suspect and not prompted by the authorities.[7] *See Edwards*, 451 U.S. at 484 ("a valid waiver cannot be established by showing only that [the accused] responded further to police-initiated custodial interrogation.").

II. THE FOURTH CIRCUIT'S CONCLUSION THAT THE MERE RESTATEMENT OF THE *EDWARDS* RULE IN *SOLEM v. STUMES* CONSTITUTED A NEW RULE CONFLICTS WITH THIS COURT'S PRIOR RULINGS AND MISAPPLIES SETTLED RETROACTIVITY PRINCIPLES

The Fourth Circuit held that the rule of *Edwards* was not adequately clarified until this Court's decision in *Solem v. Stumes*, *supra*. *Bunch*, *supra*, 949 F.2d at 1360, App. at 7a. According to the majority, *Solem* established the "new rule" that once a suspect has invoked his right to counsel, any subsequent conversation must be initiated by him. *Id.* It follows, the majority concluded, that because petitioner's conviction became final one year before the announcement of the "new rule" in *Solem*, retroactivity principles preclude him from receiving the benefits of that ruling.

Petitioner submits that the majority's conclusion is merely a strained attempt to avoid following this Court's mandate in *Edwards*, a principle established more than two years before petitioner's conviction became final. The majority's suggestion that state courts acting "reasonably" will be upheld invites state courts to construe Supreme Court rulings as narrowly as possible. Moreover, the majority opinion establishes a novel and dangerous

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[7] Petitioner's position is confirmed by the Court's decision in *Roberson*, *supra*. There, the Court held that an *Edwards* violation occurred where a different officer initiated reinterrogation three days after Roberson requested counsel and while he was still in police custody. Even more compelling are the facts in petitioner's case, where reinterrogation was initiated after petitioner had been in the custody of the very officer to whom he originally asserted his request to counsel.

principle of constitutional jurisprudence: that lower courts need not follow Supreme Court precedent until the Supreme Court repeats itself. Bunch submits that this Court should soundly reject such an argument.

The Court has recently restated how questions of retroactivity should be resolved for cases on collateral review. *See Teague v. Lane*, *supra*, 489 U.S. at 301; *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Butler v. McKellar*, *supra*, 110 S. Ct. 1212 (1990). Under these cases, new constitutional rules of criminal procedure will not be applied to those defendants whose convictions became final before the new rules were announced. *Teague*, 489 U.S. at 310. A case announces a new rule "when it breaks new ground or imposes a new obligation on the States or the Federal Government," or if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Butler*, 110 S. Ct. at 1216. Petitioner submits that the *Solem* decision did not break new ground or impose a new obligation on the states or the federal government. Moreover, as discussed above, the result petitioner seeks was dictated by precedent existing at the time his conviction became final. *See Stringer v. Black*, *supra*.

Significantly, this Court's decision in *Solem* did not purport to clarify *Edwards*. The only question posed in *Solem* was whether the *Edwards* rule should be applied retroactively, that is to convictions which became final before *Edwards* was announced on May 18, 1981. As Justice White, writing for the majority, made clear, "the question in this case [*Solem*] is whether *Edwards* should be applied retroactively." *Solem*, 465 U.S. at 639. Such an inquiry presumes that *Edwards* announced a clear rule, and the *Solem* majority never questioned that fact. It noted, "*Edwards* established a bright-line rule to safeguard pre-existing rights." *Solem*, 465 U.S. at 646. Thus, *Solem* did not "break new ground or impose a new obligation on the States or the Federal Government." As Judge Sprouse explained in his dissent:

> Retroactivity, not the parameters of *Edwards*, was the issue in *Solem*. In fact, whether the treatment of defendant Stumes violated *Edwards*, was not even an issue for decision. "We . . . assume for present purposes that the conduct at issue here violated *Edwards*." *Id.* at 642. Therefore, *Solem could not have established a new rule because it neither extended nor modified Edwards.*

Bunch, 949 F.2d at 1369, App. at 26a. (emphasis added).

Judge Sprouse's view that *Solem* did nothing but repeat *Edwards* is confirmed by this Court's opinion in *Michigan v. Jackson*, *supra*, a case cited below but not addressed by the majority. There, this Court stated, "[i]n *Solem v. Stumes*, we *reiterated* that *Edwards* established a bright-line rule to safeguard pre-existing rights . . . ." (emphasis added). 475 U.S. at 626. This Court's own description of what took place in *Solem* was ignored by the Fourth Circuit majority, and reinforces the notion that *Edwards* is in fact applicable to Bunch. As Justice Stevens stated for a unanimous court in *Yates v. Aiken*, 484 U.S. 211, 216 and n.3 (1988) (citing *United States v. Johnson*, 457 U.S. 537, 549 (1982)):

> [W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retroactively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

The Fourth Circuit's conclusion presents an irreconcilable conflict with the instruction to the lower courts contained in *Shea*, *supra*. There, the Court explained: apply *Edwards* to those defendants whose convictions were not yet final at the time *Edwards* was decided. The *Shea* opinion followed *Solem*, and this Court could have said then that *Edwards* was to be applied only to those defendants whose convictions became final after *Solem*. The

Court drew no such distinction, because this Court has never accorded *Solem* the significance crafted for it by the Fourth Circuit majority. If the Fourth Circuit were correct, and it was *Solem*, and not *Edwards*, that announced the new rule, what rule did the *Shea* court require federal and state courts to apply to convictions which became final after *Edwards* but before *Solem*? The obvious answer is that the decision in *Shea* required lower courts to recognize and apply the *Edwards* holding to *all* convictions which became final after the date that *Edwards* was decided, i.e., May 18, 1991. The Fourth Circuit ignored this mandate and certiorari and summary reversal should be granted.

CONCLUSION

Petitioner respectfully submits that certiorari and summary reversal should be granted because the Fourth Circuit's conclusion that *Edwards* was ambiguous and not clarified until after petitioner's conviction became final conflicts with *Edwards*, this Court's subsequent applications of *Edwards*, and settled retroactivity principles.

Respectfully submitted,

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April 30, 1992

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-4001

TIMOTHY DALE BUNCH,
Petitioner-Appellant,

v.

CHARLES THOMPSON, Warden,
Respondent-Appellee.

No. 90-4005

TIMOTHY DALE BUNCH,
Petitioner-Appellant,

v.

CHARLES THOMPSON, Warden,
Respondent-Appellee.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-88-645-R)

Argued: April 11, 1991

Decided: November 27, 1991

Before WIDENER, SPROUSE, and WILKINSON, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the majority opinion, in which Judge Widener joined. Judge Sprouse wrote a dissenting opinion.

COUNSEL

ARGUED: Amy Berman Jackson, Karl Anthony Racine, VENABLE, BAETJER, HOWARD & CIVILETTI, Washington, D.C., for Appellant. John H. McLees, Jr., Assistant Attorney General, Richmond, Virginia, for Appellee. ON BRIEF: Gerard F. Treanor, Jr., VENABLE, BAETJER, HOWARD & CIVILETTI, Washington, D.C., for Appellant. Mary Sue Terry, Attorney General of Virginia, Richmond, Virginia, for Appellee.

OPINION

WILKINSON, Circuit Judge:

Timothy Bunch was convicted by jury trial and sentenced to death for murder in the commission of robbery while armed with a deadly weapon in violation of Va. Code Ann. § 18.2-31(d) (1988). His conviction and sentence were affirmed by the Supreme Court of Virginia on direct appeal. The Virginia courts have considered and dismissed Bunch's state petition of habeas corpus. Bunch is now before this court appealing the district court's dismissal of his federal habeas petition. He alleges numerous points of constitutional error but argues primarily that his confession was admitted in violation of his rights under the Fifth Amendment and that he was denied effective assistance of counsel in violation of the Sixth Amendment. Finding no merit in Bunch's claims, we affirm the judgment of the district court.

I.

On January 31, 1982, Bunch killed his girlfriend Su Cha Thomas. The couple was at Thomas' house, preparing to go out for dinner when Bunch hid in a downstairs

bathroom to lure her. After shooting Thomas in the head, Bunch went upstairs and spent an hour or so drinking wine and listening to the stereo. He then ransacked the house, taking Thomas' Rolex watch, a diamond ring, a string of pearls and a gold chain. Before he left, he tied a knot in the scarf Thomas was wearing, pulled her unconscious body to a door and hung her by the scarf from the doorknob. According to the medical examiner there was a combined cause of death—"a gunshot wound to the head . . . with a secondary complication, asphyxiation by hanging."

Following the murder, Bunch pawned Thomas' watch. A report that the pawn shop filed with the police set off an investigation of Bunch, who was a sergeant in the United States Marine Corps. Bunch had met Thomas while temporarily stationed at Quantico in Virginia, but had since returned to his permanent station in Japan.

Two Virginia officials—police inspector Donald Cahill and an assistant Commonwealth's attorney—traveled to Japan to question Bunch. They informed Bunch of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), after which Bunch signed a consent form and agreed to talk with them. Bunch asserts that he asked for counsel "approximately a dozen times" during the interrogation, while the Virginia officials claim that Bunch never clearly requested counsel but only mentioned once that "he felt like he might want to talk to a lawyer." At that point, the Commonwealth's attorney left the room, but Cahill stayed and discussed another matter with Bunch for several minutes. As Cahill got up to leave, Bunch told Cahill he would cooperate and informed him that the gun was at his mother's house in Indiana and that Thomas' ring was in Japan. Cahill and the Commonwealth's attorney decided that interrogation should not continue unless Bunch signed another consent form. When Bunch refused to sign the form, the interview ended.

Bunch, still in military custody, was transported from Japan back to Quantico, which took forty-two hours. Although military personnel did not question Bunch, they informed him during the flight of his *Miranda* rights again. Upon arrival at Quantico, Bunch proceeded through processing for delivery to state authorities. During processing, Bunch met with Major Donald Jillisky, an attorney with the Marine Judge Advocate General's Office. Jillisky informed Bunch that he was not present as Bunch's attorney, but only to advise him of his situation and to transfer him to state authorities. The military attorney told Bunch of the charges he was facing and that he would either have to obtain an attorney or have one appointed for him. Jillisky also instructed Bunch that "he did not have to say anything until he consulted with his lawyer, and that it was probably not in his best interest to say anything until he consulted with his lawyer."

Following completion of the military processing, Bunch was turned over to Investigator Cahill for transportation to the state police station. During the drive, Cahill asked Bunch "if he felt he was ready to sit down and go over the case." Cahill informed Bunch that he was under no obligation to speak with Cahill and that the decision was for Bunch to make. Bunch told Cahill he had spoken with an attorney at Quantico who had advised him to contact his own lawyer before making any statements, but had decided to "get it off his chest" and tell the whole story.

When they arrived at the station, Bunch was once again advised of his *Miranda* rights. He signed a consent form and confessed to Cahill. In his confession, Bunch stated that he had decided a few days before killing Thomas to kill someone, probably a prostitute. He decided on Thomas because "she was a slut and she reminded him too much of his wife and he wanted her money." He told Cahill that he shot Thomas in the head from behind and had a sexual orgasm when doing so.

After ransacking the house, he dragged Thomas to the doorknob and hung her by her scarf, again becoming sexually aroused. He gathered her jewelry and left the house.

Bunch was tried for murder during the commission of armed robbery. The trial court suppressed the incriminating statements that Bunch had made in Japan, concluding they had been obtained in violation of his right to counsel. The court held admissible the confession Bunch gave to Cahill in Virginia, however, ruling that he had "intelligently, wittingly, freely and voluntarily" waived his rights. A jury convicted Bunch of capital murder and sentenced him to death based on the "vileness" of the crime. *See* Va. Code Ann. § 19.2-264.2 (1990). The conviction and sentence were affirmed on direct appeal. *See Bunch v. Commonwealth*, 304 S.E.2d 271 (Va. 1983).

Bunch filed a state petition for habeas corpus in February 1984. The trial court dismissed all the asserted points of error except for the claim of ineffective assistance of counsel. On that point the court conducted a plenary hearing, after which the court dismissed the claim in May 1985. The Virginia Court of Appeals dismissed Bunch's appeal for lack of jurisdiction and the Virginia Supreme Court denied Bunch's petition in February 1988. Bunch then filed a federal habeas corpus petition which the district court dismissed in March 1990.

This appeal followed. In his habeas petition, Bunch raises numerous claims of constitutional error. We shall address his two major claims—that his confession was improperly admitted and that he was denied effective assistance of counsel—in the first two sections. We then will discuss the remaining allegations.

II.

Bunch's first argument is that admission of his confession violated both his right to counsel and his right to remain silent. We shall address each claim in turn.

A.

The Virginia Supreme Court ruled on direct appeal that admission of Bunch's confession did not violate his right to counsel. On collateral review, our examination of the Virginia Supreme Court's ruling is guided by the "new rule" doctrine announced in such cases as *Teague v. Lane*, 489 U.S. 288 (1989), and *Butler v. McKellar*, 110 S. Ct. 1212 (1990). In *Teague*, the Supreme Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced" and decided that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301, 310 (emphasis in original). Thus, if the question on which the Virginia Supreme Court ruled was "susceptible to debate among reasonable minds" at the time, then a reversal on collateral review would be an application of a new rule in violation of *Teague*. *Butler*, 110 S. Ct. at 1217-18. "State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982).

Bunch seeks to avoid application of the new rule doctrine by arguing that the law in existence in June 1983 when the Virginia Supreme Court affirmed his conviction dictated that his confession be suppressed. He bases his argument on *Edwards v. Arizona*, 451 U.S. 477 (1981), and claims that case clearly established a per se rule that an accused in custody who has invoked his right to counsel cannot waive that right unless he himself initiates further conversation with the police. Bunch maintains that he never initiated any further exchanges with the police after he invoked his right to counsel and that under the clear rule of *Edwards* his confession should have been suppressed. According to Bunch, the Virginia

Supreme Court should never have reached the issue of whether he intelligently and knowingly waived his rights because that issue arises only when the suspect initiates conversation.

Our examination of the law at the time of the Virginia Supreme Court decision, however, convinces us that the admissibility of the confession was "susceptible to debate among reasonable minds." The Virginia Supreme Court ruled the confession admissible both because Bunch "intelligently, wittingly, freely and voluntarily" waived his right to counsel and because Investigator Cahill's inquiry did not amount to police-initiated interrogation under *Edwards*. *Bunch*, 304 S.E.2d at 277. At that time, *Edwards* did not dictate a contrary conclusion.

It seems clear today that *Edwards* established a bright-line rule that before a suspect can waive his invoked right to counsel he must be the party to initiate subsequent communication. *See Solem v. Stumes*, 465 U.S. 638, 646-47 (1984). That holding was not universally clear to state courts struggling with *Edwards* when the opinion was first issued, however. *See, e.g., Richardson v. State*, 625 S.W.2d 504 (Ark. 1981); *Leuschner v. State*, 433 A.2d 1195 (Md. Ct. Spec. App. 1981). Even had that point been perfectly obvious, *Edwards* left numerous other issues unresolved—most notably, what acts constituted initiation and interrogation. The *Edwards* opinion nevertheless recognized that such matters were germane to any right to counsel analysis. "The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver." 451 U.S. at 485-86. Justice Powell, concurring in the result in *Edwards*, was the only one to address directly the meaning of "initiation" and "interrogation" in this context:

> [P]olice do not impermissibly 'initiate' renewed interrogation by engaging in routine conversations with suspects about unrelated matters. And police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney. It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk. Nothing in the Constitution erects obstacles that preclude police from ascertaining whether a suspect has reconsidered his original decision.

451 U.S. at 490 (citations omitted). Still, the Supreme Court could not agree on what constituted initiation in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), a case decided shortly after Bunch's conviction became final. That the Virginia Supreme Court reasonably applied *Edwards* can readily be seen through an examination of contemporaneous courts' interpretations of that case and of the concepts of initiation and interrogation.

In *Moulds v. State*, for example, the Alabama Court of Criminal Appeals considered an accused who had unequivocally invoked her right to counsel but who had been unable to contact her attorney. 429 So. 2d 1176 (Ala. Crim. App. 1983). A police sergeant spoke with the accused for a few minutes and then told her that her attorney would tell her not to make a statement. The accused responded that she "wanted to go ahead and talk anyway." The court concluded that "[t]he defendant's assertion that she was ready to make a statement, even if made in response to an officer's inquiry of whether she had 'changed her mind about speaking to them without an attorney,' constitutes a communication initiated by the accused under *Edwards*." *Id.* at 1179. *See McCall v. State*, 501 So. 2d 496, 500 (Ala. Crim. App. 1986). The court also specifically rejected the argument that the ser-

geant's actions constituted interrogation under *Rhode Island v. Innis*, 446 U.S. 291 (1980):

> The defendant was subjected to neither "express questioning" nor to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

429 So. 2d at 1178 (citing *Innis*).

The Supreme Court of Connecticut reached a similar conclusion in *State v. Acquin*, 448 A.2d 163 (Conn. 1982). There the suspect had clearly requested counsel but rejected all suggestions for obtaining one. In response to further police questioning the suspect revealed that "it wasn't really an attorney that he wanted, it was just somebody he could trust." *Id.* at 170. After poilce brought in the accused's requested psychiatrist, he confessed. Citing Justice Powell's concurrence in *Edwards* that "police legitimately may inquire whether a suspect has changed his mind," the court found no violation of the suspect's right to counsel. "Unquestionably, the defendant invoked his right to counsel. . . . however, subsequent legitimate questions to find out whom he wanted showed that the request was not as unequivocal as it appears to be on its face." *Id.* at 176. The Supreme Court of Connecticut also dismissed the idea that the questions directed at clarifying the defendant's request for counsel constituted interrogation under *Rhode Island v. Innis*, 446 U.S. 291 (1980). "They were not of the kind likely to elicit an incriminating response." 448 A.2d at 175.

In *State v. Scott*, 626 S.W.2d 25 (Tenn. Crim. App. 1981), the defendant invoked his right to counsel whereupon the police stopped interrogation. While being escorted back to the holding cell, however, the suspect spoke with his girlfriend who loudly urged him to "tell

the truth." The officer escorting the suspect then asked the defendant whether he wanted to talk about the case or continue to the holding cell. The suspect confessed. The court refused to suppress the statement, concluding that "[t]hese facts cannot be equated with a resumption of the interrogation as condemned by *Edwards*." *Id.* at 29. *See also Johnson v. State*, 303 S.E.2d 7, 8 (Ga. 1983) ("Police may legitimately inquire whether a suspect has changed his mind about speaking to them with or without an attorney.").

The Virginia Supreme Court decision is similar to those of other states interpreting the meaning of initiation and interrogation in the immediate aftermath of *Edwards*. The Virginia court concluded that Cahill's asking Bunch "if he felt he was ready to sit down and go over the case" was a legitimate attempt to determine whether Bunch's decision not to speak with the police without an attorney present had changed. 304 S.E.2d at 277. Cahill testified at the suppression hearing that he asked the question because he knew that Bunch had just spoken with a lawyer. As in the *Moulds* case, Cahill informed Bunch that he "certainly was not required to talk to [Cahill] if he didn't want to." This communication from Cahill was a far cry from the communication in *Edwards*, where the accused was informed that "he had to talk" to the police. The Virginia Supreme Court thus determined that Cahill's inquiry "amounted to nothing more than an effort to ascertain if Bunch had changed his mind about wanting an attorney and, hence, did not amount to police-initiated interrogation within the meaning of *Edwards*." 304 S.E.2d at 277. The court's opinion that Cahill's question was not police-initiated interrogation under *Edwards* was perfectly consistent with other case law at the time and must be considered a reasonable application of that case.

Bunch nevertheless argues that he did not make a knowing and intelligent waiver. This claim has been waived because Bunch did not raise it on state habeas or

even to the federal district court. *See Harrison v. Warden, Maryland Penitentiary*, 890 F.2d 676 (4th Cir. 1989); *Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1986). The claim is also meritless. Bunch had been informed of his rights numerous times, he had received legal advice to remain silent, he had been informed that he was not required to speak with Cahill, and he had understood that his confession could result in the death penalty. As the Virginia Supreme Court stated, this was a case of an individual

> who, despite repeated warnings of his rights and contrary to sound advice "not to say anything," decided "he was ready to tell the whole story" and "wanted to get it off his chest." Moments before confessing, he stated in writing that he did not want a lawyer and that he was willing to answer questions. We can conceive of no clearer case of a "'knowing and intelligent relinquishment or abandonment'" of [*Miranda*] rights.

304 S.E.2d at 277 (citing *Wyrick v. Fields*, 459 U.S. 42 (1982)).

We therefore dismiss Bunch's claim on collateral attack on the basis of *Teague v. Lane* and its progeny. Those cases require that the Virginia Supreme Court ruling be judged against the backdrop of other case law at the time of its decision on direct appeal, not against the law that may have evolved during the time that Bunch's case made its various rounds on collateral review. To grant the writ would hold the Virginia Supreme Court's application of *Edwards* in 1983 to be beyond the pale of "reasonable, good-faith interpretation[] of existing precedents." *Saffle v. Parks*, 110 S. Ct. 1257, 1260 (1990) (quoting *Butler*). This we decline to do. The Virginia court was ruling on a close question of law at the margins of the *Miranda* doctrine, namely, under what circumstances any subsequent conversations between a suspect and officials could be considered a reinitiation of interrogation by the

state. The Virginia Supreme Court's ruling on that point warrants respect from a federal habeas court as one that reasonable jurists could make. *See Butler*, 110 S. Ct. at 1217-18.[1]

B.

Bunch also argues that his confession should have been suppressed because he asserted his right to remain silent in Japan and Virginia investigators did not "scrupulously honor" that right as required by *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). When Bunch raised this claim in his state habeas petition, the Commonwealth, in its "Motion to Dismiss," responded that the claim had been procedurally defaulted because it had not been raised either at trial or on direct appeal. *See Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974). The Commonwealth made no other arguments opposing the claim. The circuit court dismissed the claim "for the reasons stated in the Motion to Dismiss." Thus, the circuit court clearly dismissed the claim on the grounds of the state procedural default. *See*

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[1] The dissenting opinion quite fails to appreciate the fact that the rule announced in *Edwards* did not define all the terms by which the rule would be implemented. The *Edwards* holding rested upon the concepts of initiation and interrogation, the precise boundaries of which the state courts could legitimately determine were undefined. Unlike the dissent, we decline to hold in hindsight that the substantial number of state courts struggling with these concepts were in any way intent upon disregarding higher authority. We have no indication, for example, that Virginia was attempting to do anything other than conscientiously apply the *Miranda* doctrine. Indeed, state and military authorities gave Bunch his *Miranda* warnings on no less than three separate occasions and the state courts in fact threw out his confession in Japan as violative of his right to counsel.

In that same regard, we wish to make plain that federal intermediate courts refusing to apply new rules to reverse state convictions on collateral attack are not criticizing any lack of clarity in earlier Supreme Court decisions, but are only acknowledging what *Teague* and its progeny now require us to acknowledge—that even the clearest decisions will leave some questions for the state courts in good faith to resolve.

Coleman v. Thompson, 111 S. Ct. 2546, 2559-61 (1991) (grant of a motion to dismiss on state procedural grounds neither rests on nor is interwoven with federal law). The Supreme Court of Virginia refused the petition for appeal "[u]pon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal." This order of the Virginia Supreme Court provides no evidence that that court considered the claim on the merits. Where "the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Ylst v. Nunnemaker*, 111 S. Ct. 2590, 2594 (1991). In such circumstances, the procedural default must be considered an adequate and independent state ground that forecloses review of the claim in federal court. *Coleman*, 111 S. Ct. at 2557-61.[2]

III.

Bunch next argues that he was denied the right to effective assistance of counsel in violation of the Sixth Amendment. His primary point is that trial counsel was ineffective in preparing and presenting mitigating evidence at the sentencing phase of the trial. He additionally raises other allegations of deficient performance that the government urges are procedurally barred. We shall address these arguments in turn.

A.

The standard of review for ineffective assistance of counsel claims is a familiar one. Under *Strickland v.*

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[2] Relying on Justice O'Connor's concurring opinion in *Duckworth v. Eagan*, 492 U.S. 195 (1989), the Commonwealth argues that federal courts should not apply on collateral review the exclusionary rule for *Miranda* violations. *See Stone v. Powell*, 428 U.S. 465 (1976) (federal habeas courts reviewing state criminal convictions will not apply the exclusionary rule for Fourth Amendment violations). Because we rest this decision on narrower grounds, we need not address this question.

Washington, 466 U.S. 668, 687 (1984), in order to establish a violation of his Sixth Amendment rights, Bunch must show that his counsel's performance was deficient and that the deficiency so prejudiced his defense as to deprive him of a fair trial. This is no insubstantial burden, as "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Bunch asserts that his court-appointed attorneys performed inadequately by failing to investigate and present potentially mitigating factors at the sentencing phase. Bunch presented to the state habeas court numerous affidavits containing mitigating evidence that he asserts was easily available during the trial. Those affidavits came from various family members and friends, a few neighbors, a law student who interviewed military officers who had some contact with Bunch, and Bunch's state habeas attorney who had interviewed Bunch's ex-wife. Bunch argues that his counsel should have offered the jury more mitigating evidence than simply his mother's testimony. *See Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968).

We are unpersuaded. It is becoming all too commonplace to charge even diligent counsel in the midst of difficult circumstances with the adverse outcome in a capital case. When examining ineffective assistance claims, however, we must appreciate the practical limitations and tactical decisions that trial counsel faced. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. Particularly when evaluating decisions not to investigate further, we must regard counsel's choices with an eye for "reasonableness in all the cir-

cumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691.

Our review of the record reveals that Bunch's attorneys made reasonable determinations in deciding how best to present mitigating factors. For example, counsel did not have the psychiatrist who evaluated Bunch for potential mitigating evidence testify before the sentencing jury. Bunch contends that the psychiatrist could have informed the jury of Bunch's stressful childhood, which included domestic violence, and of his loss of self-esteem following the dissolution of his marriage. In addition, the doctor could have testified that Bunch's lack of a prior criminal record indicated some ability to control his behavior, that he was under extreme pressure at the time of the murder, and that he had the capacity for rehabilitation.

Counsel was aware of this beneficial testimony but was also cognizant of the risks involved if the psychiatrist had taken the standard. State psychiatrists had evaluated Bunch and made damaging findings of which the prosecution was aware. Had Bunch's attorneys called their psychiatrist, harmful evidence would have emerged on cross-examination. Counsel feared that the overall impact of the psychiatric testimony would be to reinforce all the negative aspects of Bunch's self-destructive behavior. Bunch's lawyers were additionally worried by "some unusual sexual orientation aspects of the case that we in no way wanted the jury to hear about." Having interviewed the state psychiatrists in addition to their own witness, counsel made a reasoned strategic choice not to offer psychiatric testimony. To use that decision as a basis for finding ineffective assistance would be to institute a rule that psychiatric testimony should always be offered in the sentencing phase, no matter how counterproductive or damaging. This we refuse to do. Trial counsel is too frequently placed in a no-win situation with respect to possible mitigating evidence at the sentencing phase of a capital case. The failure to put on such evi-

dence, or the presentation of evidence which then backfires, may equally expose counsel to collateral charges of ineffectiveness. The best course for a federal habeas court is to credit plausible strategic judgments in the trial of a state case.

This view governs our disposition of the remaining mitigation claims. With respect to possible military mitigating witnesses, counsel spoke with the commanding officer of the correctional facility where Bunch had last been stationed as well as with the first sergeant of that facility. The commanding officer reported that Bunch had unsatisfactory working relationships with his peers, had been dismissed from his position for drug related problems and would not have been recommended for reenlistment. The first sergeant had taken his post after Bunch had been arrested but was familiar with his reputation and was unable to offer any positive information. Additionally, counsel contacted the military liaison officer for Bunch's case and obtained copies of Bunch's military record to provide the evaluating psychiatrist. With finite hours and other demands in the case, counsel chose not to spend valuable time pursuing what appeared to be an unfruitful line of investigation. This too was a reasonable decision.

Counsel contacted and interviewed Bunch's parents. Although initially hopeful about presenting Bunch's father as a favorable witness, counsel was concerned about both his reliability and the possibility of contradictory testimony. For example, Bunch's father did not show up for an important meeting with counsel because he had gotten drunk the night before. Also, much of the mitigation strategy was to highlight Bunch's traumatic childhood, including the facts that Bunch's father had been mostly absent from the home, had a drinking problem and had been abusive to Bunch's mother. Counsel worried that Bunch's father would downplay this history and that they would in effect end up impeaching their own witness.

They made a defensible strategic decision not to put him on the stand.

Bunch's mother was prepared for trial and ready to testify to Bunch's family and social histories, his lack of disciplinary problems in schools, his lack of a criminal record, and his efforts to reconcile with his wife. When she actually testified, however, counsel had to ask a number of leading questions in order to elicit the favorable information. Her emotional effect was blunted, as well, also diminishing her effectiveness as a witness.

Bunch now makes much of the outcome that only one witness, who was disappointing, testified in his behalf. Yet when counsel was preparing for the sentencing phase and asked both Bunch and his parents for names of potential witnesses with information that they could not provide, they did not suggest any. While counsel was aware of other family members, they believed that such testimony would only be cumulative with that of Bunch's mother. One of those whom Bunch now argues that counsel should have contacted is his ex-wife. Before the trial, however, Bunch instructed his counsel not to contact his ex-wife or to involve her in the case. It is difficult for us to fault counsel for failing to obtain additional testimony when the client himself was not forthcoming with names. *See Strickland*, 466 U.S. at 691; *Tucker v. Kemp*, 776 F.2d 1487, 1490 (11th Cir. 1985).

Under these circumstances we conclude that Bunch's counsel made reasonable professional judgments and did not render constitutionally defective assistance of counsel. Counsel "did interview all potential witnesses who had been called to [their] attention and [] there was a reasonable basis for [their] strategic decision[s]." *Burger v. Kemp*, 483 U.S. 776, 794-95 (1987). Bunch has simply not shown that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

B.

Bunch raises additional claims that his right to effective assistance of counsel was violated. He contends that at the guilt phase of trial his rights were violated by his attorneys' failures: (i) to conduct adequate *voir dire*; (ii) to object to the Commonwealth's opening statement; (iii) to deliver an effective opening statement; (iv) to object to irrelevant inadmissible testimony; (v) to object to improper cross-examination of Bunch; (vi) to preserve for review the adequacy of the Indiana search warrant; (vii) to object to admission of the gun. He also alleges other instances of ineffective assistance at the sentencing phase.

We affirm the district court's judgment that these additional claims are procedurally barred. The only claim of ineffective assistance of counsel that Bunch presented to the Virginia Supreme Court for collateral review concerned counsels' duty to investigate and present mitigating evidence at the sentencing phase. These other claims are therefore barred under *Whitley v. Bair*, 802 F.2d 1487, 1500 (4th Cir. 1986), and *Wainwright v. Sykes*, 433 U.S. 72 (1977).

IV.

Bunch asserts other points of error which occurred during the guilt phase of the trial. We shall address each in turn.

A.

Bunch protests the introduction into evidence of two photographs of Thomas: one showing her hanging from the doorknob as she was found, and one black and white photograph of Thomas on the autopsy table. He argues that these photographs were inflammatory and that his conviction and sentence cannot have been the result of a reasoned and rational determination. *See Gregg v. Georgia*, 428 U.S. 153, 190 (1976).

Bunch did not challenge at either trial or on appeal the photograph of the crime scene. That claim is therefore

precluded. *Wainwright v. Sykes*, 433 U.S. 72 (1977). With respect to the second print, admission of evidence rests in the sound discretion of the trial court. Absent extraordinary circumstances, such questions of admissibility are matters of state law. The court admitted the photo for identification purposes and Bunch has shown no extraordinary circumstances that would justify disturbing that ruling. *See United States v. MacDonald*, 688 F.2d 224, 227-28 (4th Cir. 1982). Admission of the photograph was not a violation of fundamental fairness. *See Moore v. Illinois*, 408 U.S. 786, 798-800 (1972).

B.

Bunch also maintains that the evidence at trial was insufficient to establish a murder during the commission of a robbery, which was the basis for his capital murder conviction. *See* Va. Code Ann. § 18.2-31(d) (1988). He argues that where the killing and the unlawful taking are two separate acts and there was no intent to steal at the time of the killing, there is no robbery. *See Branch v. Commonwealth*, 300 S.E.2d 758, 760 (Va. 1983). Bunch asserts that he had no intent to rob Thomas prior to the murder and took her jewelry only in an attempt to disguise the crime.

The Virginia Supreme Court considered this argument on direct appeal and summarized the "overwhelming" evidence that Bunch killed Thomas during commission of a robbery. That evidence included Bunch's statements to friends before the murder that he needed money badly, that he should "go up there to Dale City and knock that bitch off . . . and get her rings and things," and Bunch's confession, wherein he said his plan had been "to go down and take her jewelry and kill her and leave the area." This is more than sufficient evidence that Bunch had the intent to rob Thomas when he killed her.

C.

Bunch also asserts that his Sixth Amendment right to cross-examine witnesses and his Fourteenth Amendment rights to due process and equal protection were violated when the trial court failed to provide funds for Bunch to hire a pathologist.

Bunch waived this claim at trial and did not present it on direct appeal or at any phase of state habeas. It is therefore barred. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *see also Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974) (failure to raise issue at trial and on direct appeal bars state habeas review).

D.

One of Bunch's friends testified that Bunch spoke with him two weeks before the murder about wanting to rob a Pizza Hut. Bunch argued at trial and on direct appeal that this evidence was too remote from the crime to be relevant as to his intent to rob Thomas. On state habeas, Bunch enhanced his argument against this testimony's admissibility by asserting that it was unduly prejudicial character evidence. He asserts that his preserved claim of irrelevancy was broad enough to incorporate the newer grounds of inadmissibility.

Bunch's objection at trial was framed solely in terms of irrelevancy, however, and not in terms of constitutional deprivations. The state habeas court considered Bunch's argument and granted the government's motion to dismiss the claim on the grounds of procedural default. This is an adequate and independent state ground for decision that forecloses consideration of the claim on federal habeas review. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *Ylst v. Nunnemaker*, 111 S. Ct. 2590 (1991). We see no reason in any event to disturb the discretion of the state trial court on this evidentiary ruling.

V.

Bunch also asserts numerous claims of errors made at the sentencing phase of his trial. We shall address these claims too in order.

A.

Under Virginia's capital sentencing scheme, a death sentence cannot be imposed unless a jury determines beyond a reasonable doubt that the defendant represents a future danger to society or that the defendant's conduct was particularly vile. Va. Code Ann. §§ 19.2-264.2, -264.4(C) (1990). The trial court submitted to the jury only the question of vileness. A jury can impose a sentence of death for vileness only if the defendant's conduct satisfied one of three statutory predicates: "torture, depravity of mind or aggravated battery to the victim." Va. Code Ann. § 19.2-264.4(C) (1990). Bunch argues that the trial court's instructions regarding the death penalty were constitutionally infirm for two reasons. First, he asserts that the court should have instructed the jurors that they must be in unanimous agreement as to which of the three vileness predicates existed. *See Andres v. United States*, 333 U.S. 740, 748 (1948). Second, Bunch asserts that the vileness predicate is unconstitutionally vague and that the trial court erred in failing to provide a limiting instruction.

We find no error in the instructions given by the trial court. With respect to the unanimity claim, we observe that the Virginia legislature has identified three different types of conduct, any of which would satisfy a finding of vileness. Virginia does not require that the jury identify the particular predicate on which it relies. *Clark v. Commonwealth*, 257 S.E.2d 784, 791-92 (Va. 1979). The jurors, when polled, indicated that the finding of vileness was unanimous. That affirmance effectively "moots any claim of error in the instructions on unanimity." *Briley v. Bass*, 742 F.2d 155, 166 (4th Cir. 1984); *see also Schad*

v. Arizona, 111 S. Ct. 2491, 2496-2500 (1991) (unless statutory alternatives were actually separate crimes, jurors' verdict was unanimous). This court has already considered the argument that the Virginia vileness statute is unconstitutionally vague and has rejected it. *See Clozza v. Murray*, 913 F.2d 1092, 1105 (4th Cir. 1990).

B.

Bunch alleges that the trial court erred in failing to strike for cause two jurors who were biased in favor of the death penalty, thus yielding "a jury uncommonly willing to condemn a man to die." *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968). Although Bunch did not raise this claim either at trial or on direct appeal and it is procedurally barred, *Murray v. Carrier*, 477 U.S. 478 (1986), Bunch asserts that the alleged error was such a fundamental miscarriage of justice that review is still available. *See Sykes*, 433 U.S. at 91.

The record, however, reveals that neither veniremember was biased. Although both potential jurors had initially agreed with the statement that the death penalty should be imposed in every case of murder regardless of the facts and circumstances, both changed their positions upon immediate requestioning. Failure to strike the potential jurors for cause did not lead to a fundamental miscarriage of justice where, as here, they stated their ability to consider fairly and impartially sentences besides death.

C.

The Commonwealth introduced evidence at the sentencing phase that Bunch associated with prostitutes and had thoughts about killing people and becoming a mercenary hit man. Bunch asserts that this evidence relates only to future dangerousness and not to vileness and should have been excluded from the sentencing phase.

This objection was not raised at trial and the state habeas court found the claim procedurally barred under

Virginia's contemporaneous objection rule. Our review of the claim is therefore also barred. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *Ylst v. Nunnemaker*, 111 S. Ct. 2590 (1991).

D.

Bunch finally requests that we declare the Virginia death penalty statute and sentencing procedures to be facially unconstitutional. As the district court observed, the Supreme Court has upheld statutes similar to Virginia's both as to future dangerousness, *see Jurek v. Texas*, 428 U.S. 262, 269, 274-76 (1976), and as to vileness. *See Gregg v. Georgia*, 428 U.S. 153, 201 & n.51 (1976). Bunch's claim is also conclusory in nature and disregards the multitude of challenges to the application of Virginia's capital punishment scheme which have been rejected.

VI.

For the foregoing reasons, we hold Bunch's claim to be without merit. The judgment of the district court is hereby

AFFIRMED.

SPROUSE, Circuit Judge, dissenting:

I concur in all of the majority opinion except Part II. A. which I respectfully dissent.

The majority believes that the language used by the Supreme Court in *Edwards* was confusing and that the *Edwards* rule was neither bright nor linear. It is the majority's view that not until *Solem* was *Edwards* clarified as establishing "a bright-line rule that before a suspect can waive his invoked right to counsel he must be the party to initiate subsequent communication."

In my view, the bright-line rule was clearly announced in *Edwards*. *Solem* did not alter or modify the *Edwards* rule. Since the parameters of the waiver of counsel requirements were established in *Edwards*, consideration

of *Teague's* retroactivity principles is simply misplaced. Accordingly, the Virginia courts should have observed *Edwards* and suppressed Bunch's statement to Cahill. Although the *Edwards* majority was challenged within the Supreme Court by two separate opinions, the majority rejected those challenges and, as shown in *Bradshaw*, and *Solem*, persisted in its view that once a defendant invokes his right to counsel, the accused must initiate conversation to establish a valid waiver.

The Supreme Court in *Edwards*, realizing that additional safeguards were necessary to protect an accused's request for counsel, held that:

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. *We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.*

Id. at 484-85 (emphasis added). The six-justice majority could not have been any clearer in its holding that once a suspect invokes his right to counsel, only communication initiated by the accused can provide the basis for further interrogation.

Chief Justice Burger concurred only in the judgment because he disagreed with the majority about the need for a "special" rule concerning the waiver of a right to be free from interrogation—opining that the validity of such waivers should be determined under the particular facts and circumstances standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938). Justice Powell also refused to join

the majority. Like Justice Burger, he was of the view that the issue of Edwards' waiver of counsel should have been considered under the *Zerbst* standard. Justice Powell also criticized "what appears to be an undue, and undefined, emphasis on a single element: 'initiation.'" *Id.* at 491-92.

The majority here claims *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), decided six days after Bunch's state appeal, demonstrates that *Edwards* was an uncertain rule. In *Bradshaw*, however, eight members of the Supreme Court restated that the waiver ruling in *Edwards* was absolute. The plurality opinion stated:

> We think the Oregon Court of Appeals misapprehended the test laid down in Edwards. We did not there hold that the "initiation" of a conversation by a defendant such as respondent would amount to a waiver of a previously invoked right to counsel; we held that after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place "unless the accused himself initiates further communication, exchanges, or conversations with the police."

Id. at 1044 (citations omitted). Four dissenting justices agreed. The dissent stated, "To establish a waiver, it would thus be a necessary fact that the accused, not the police, reopened the dialogue with the authorities." *Id.* at 1053 (internal quotations, emphasis, and citations omitted). Although the justices disagreed as to whether the defendant had in fact initiated conversation, both the plurality and the dissent agreed the defendant must be the one to initiate conversation for a valid fifth amendment waiver.

The issue in *Solem v. Stumes*, 465 U.S. 638 (1984), was whether *Edwards* established a "new rule" so as to apply retroactively to a state court decision rendered before *Edwards*. Justice White, for a five-member majority, wrote:

> *Edwards* established a bright-line rule to safeguard pre-existing rights, not a new substantive requirement. . . . *Edwards* established a new test for when that waiver would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication. . . .
>
> Before *Edwards*, the question whether the authorities could resume questioning after a defendant has asked for an attorney was acknowledged to be unsettled.

Solem, at 646, 648. The *Solem* court held that since *Edwards* established a "new rule," it was not to be retroactively applied. Retroactivity, not the parameters of *Edwards*, was the issue in *Solem*. In fact, whether the treatment of defendant Stumes violated *Edwards* was not even an issue for decision. "We . . . assume for present purposes that the conduct at issue here violated *Edwards*." *Id.* at 642. Therefore, *Solem* could not have established a new rule because it neither extended nor modified *Edwards*.

The majority here holds that the Virginia Supreme Court could have reasonably interpreted *Edwards* to sanction the type of reinterrogation conducted by Officer Cahill, because not until *Solem* was it clear that the interrogation violated the rule established in *Edwards*. Because *Solem* announced a new rule, the majority reasons, it is not to be applied retroactively to Bunch. I disagree.

In *Teague*, Justice O'Connor defined a "new rule:"

> [A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Teague at 301. It is true that the Supreme Court in considering the "new rule" principle of *Teague* stated:

"The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 58 U.S.L.W. 4294, 4296 (March 5, 1990). Not even in the most generous recognition of comity, however, could we suggest that a state court's interpretation of a United States Supreme Court decision on federal constitutional law is reasonable when the United States Supreme Court has clearly reached a contrary conclusion.

The majority here relies on the opinion of various state courts to illustrate that other state courts' interpretation of *Edwards* was similar to that of the Virginia Supreme Court in this case. The problem I have with that approach is that a majority of the United States Supreme Court justices have expressed views inconsistent with those expressed by these state appellate bodies. Although the majority here may take some comfort from the concurrence of Justice Powell in *Edwards* that he found the majority opinion confusing, it goes without saying that if the majority of the Supreme Court holds the *Edwards* opinion to be clear—it is clear.

In collateral review cases, the Supreme Court, of course, is always sensitive to the effect of its opinions on the administration of criminal justice in state courts. *Teague* at 308. Whether or not this comity concern is really another aspect of the sometime tension between concerns of finality on the one hand and fundamental fairness and protection of truth-finding procedures on the other, state court decisions cannot undermine the finality of decisions of the United States Supreme Court, under any of the various formulations for determining issues of retroactivity. *See Teague; Griffith v. Kentucky*, 479 U.S. 314 (1987); *Mackey v. United States*, 401 U.S. 667 (1971); *Desist v. United States*, 394 U.S. 244 (1969); *Stovall v. Denno*, 388 U.S. 293, (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965); *Palko v. State of Connec-*

ticut, 302 U.S. 319 (1937). The majority opinion here, however, would interpret *Teague* as allowing lower courts to render a clear decision of the Supreme Court unclear; the result produces the very lack of finality the majority panel here decries.

So no matter how respectable state judicial authorities might be, we are concerned here with a federal constitutional issue. Although some state courts have reacted to *Edwards* as if its intentions were unclear and the announced test confusing, a majority of the Supreme Court has consistently treated it as announcing a bright-line test. The test in *Solem* is no different than in *Edwards*. Its results were dictated by the existing precedent of *Edwards*. *Edwards* clearly held that once a suspect invokes the right to counsel, police interrogation must not be renewed unless the suspect initiates the conversation.

Here Detective Cahill asked Bunch "if he felt he was ready to sit down and go over the case"—clearly Cahill, not Bunch, initiated the conversation leading to the subsequent interrogation at the Prince William County police station. That was a violation of Bunch's fifth and fourteenth amendment rights defined by *Edwards*. In Affirming the state trial court's denial of suppression, the Virginia Supreme Court committed constitutional error. Accordingly, I dissent on this issue.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-4001
CA-88-645-R

TIMOTHY DALE BUNCH
Petitioner-Appellant,

v.

CHARLES THOMPSON, Warden
Respondent-Appellee.

No. 90-4005

TIMOTHY DALE BUNCH
Petitioner-Appellant,

v.

CHARLES THOMPSON, Warden
Respondent-Appellee.

On Petition for Rehearing with Suggestion
for Rehearing In Banc

[Filed January 31, 1992]

Appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Wilkinson and Judge Widener voted to deny rehearing. Judge Sprouse voted to grant rehearing, and should be shown as dissenting from the majority's denial of rehearing.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Russell, Widener, Hall, Wilkinson, Wilkins, Niemeyer, Hamilton and Luttig voted to deny rehearing in banc; and Chief Judge Ervin and Judges Phillips, Murnaghan, and Sprouse voted to grant rehearing in banc.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as the majority of the active circuit judges voted to deny rehearing in banc,

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Widener. Judge Sprouse dissents.

For the Court,

/s/ John M. Greacen
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 88-0645-R

TIMOTHY DALE BUNCH,
Petitioner,

v.

CHARLES E. THOMPSON, WARDEN,
Respondent.

MEMORANDUM OPINION

[Filed Mar. 16, 1990]

This matter is before the Court on respondent's motion to dismiss the federal habeas corpus petition filed by Timothy Dale Bunch and Bunch's cross-motion for partial summary judgment. For the reasons stated in this memorandum opinion, the Court will GRANT respondent's motion to dismiss the petition.

I

On January 31, 1982, petitioner Timothy Dale Bunch killed Ms. Su Cha Thomas by shooting her in the head and then using one of her scarves to hang her from a doorknob. An autopsy revealed both a gunshot wound and congestion of blood vessels in the lungs, indicating that her death resulted from a combination of the gunshot wound and the hanging. After the murder, Bunch removed several items from Ms. Thomas' home, including a Rolex watch, a diamond ring, and a pearl necklace. Bunch then ransacked the house in order to make it appear that an intruder had broken in and committed the

murder. Later, Bunch stated that he killed Ms. Thomas because "she was a slut and she reminded him too much of his wife and he wanted her money." *Bunch v. Commonwealth*, 225 Va. 423, 430, 304 S.E.2d 271, 280, *cert. denied*, 464 U.S. 977 (1983).

Prior to the murder, Bunch and Ms. Thomas had developed an intimate relationship. Bunch, a sergeant in the United States Marine Corps, was stationed temporarily at Quantico, Virginia. He had met Ms. Thomas, a divorcee living in Dale City, Virginia, after he arrived at Quantico in December, 1981. Soon after the murder, Bunch returned to his permanent duty station at Iwakumi, Japan.

Before returning to Japan, Bunch sold a watch similar to Ms. Thomas' at a pawn shop in Arlington County, Virginia. The shop owner reported the sale to the police, who began to investigate Bunch. On February 16, 1982, Investigator Donald L. Cahill and Assistant Commonwealth's Attorney William Hamblen travelled to Japan with warrants charging Bunch with murder and robbery. Cahill met Bunch, informed him of his *Miranda* rights, and had Bunch sign a "Warning and Consent" form. Bunch indicated he was willing to talk with Cahill. At some point in the interrogation, Bunch indicated he wanted to talk to a lawyer. Hamblen left the room at that point, and Cahill talked to Bunch about another matter for several minutes. As Cahill was leaving the room, Bunch said he would cooperate. He then told Cahill that "the gun" was at his mother's home in Indiana and "the ring" was in Japan.

At that time, Cahill and Hamblen decided that the questioning should end unless Bunch signed another "Warning and Consent" form. Bunch refused to sign another form, and the interrogation ceased. Three days later, Bunch was moved from Japan to the custody of civil officials in Virginia. He was advised of his *Miranda* rights again during the trip. Bunch arrived in Quantico

after midnight on February 21 and was processed for delivery to Prince William County authorities.

As part of the processing, Bunch spoke with Major Donald R. Jillisky, a lawyer with the Marine Judge Advocate General's Office. Jillisky described the charges to Bunch and advised him that "he did not have to say anything until he consulted with his lawyer and that it was probably not in his best interest to say anything until he consulted with his lawyer."

After processing, Bunch was again turned over to Cahill. On the way to the Garfield police station ("Garfield"), Cahill asked Bunch "if he felt he was ready to sit down and go over the case" and told Bunch that "at that time it didn't matter to me if he did or didn't. It was entirely up to him, and he certainly was not required to talk to me if he didn't want to." Bunch said that he had spoken to a lawyer at Quantico and had been advised "not to say anything" and to talk to a lawyer before talking to the police. He also said that he was ready to tell the whole story. At Garfield, Bunch was again given his *Miranda* warnings and he signed a "Warning and Consent" form. He then confessed the details of the crime to Cahill.

Bunch was tried in Prince William County Circuit Court for murder during the commission of armed robbery. The trial judge suppressed the statements Bunch made to Cahill while in Japan, finding that Bunch had requested and had been denied the assistance of counsel. The judge found, however, that Bunch had intelligently, wittingly, freely and voluntarily waived his *Miranda* rights before making the confession in Virginia, and so the Virginia confession was admitted into evidence.

After returning a guilty verdict, the jury considered evidence during the sentencing phase of the trial. The jury recommended the death sentence based upon the "vileness" statutory aggravating factor. Va. Code Ann.

§ 19.2-264.2 (1983). Following preparation of a presentence report, the judge imposed the death sentence on November 12, 1982.

Bunch's appeal was consolidated with the statutory review of his death sentence. The conviction and sentence were affirmed on June 17, 1983. *Bunch*, 225 Va. 423, 304 S.E.2d 271. Bunch filed a state petition for habeas corpus on February 27, 1984. On November 16, 1984, the trial court dismissed all of Bunch's claims of error except ineffective assistance of counsel. The judge held a plenary hearing on that claim on January 28, 1985, and dismissed the remainder of the petition on May 28, 1985.

Bunch appealed the state habeas corpus decision to the Virginia Court of Appeals, which dismissed it for lack of jurisdiction on July 6, 1987. He then petitioned for appeal to the Supreme Court of Virginia, which refused the petition of February 26, 1988. The parties agree that Bunch has no remaining state court remedy.

In his federal habeas corpus petition, Bunch alleges a host of violations of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. They are listed below:

I. Guilt Phase

A. Bunch's constitutional rights were violated when the trial court admitted into evidence statements improperly obtained after Bunch asserted his rights to remain silent and to consult with an attorney.

B. Bunch's constitutional rights were violated when the trial court admitted into evidence statements made involuntarily.

C. Bunch's constitutional rights were violated by a conviction based on insufficient evidence of a murder during the commission of a robbery.

D. Bunch's constitutional rights were violated by the trial court's failure to exclude two jurors for cause.

E. Bunch's constitutional rights were violated by the admission of irrelevant, unduly prejudicial character testimony.

F. Bunch's constitutional rights were violated by the admission of inflammatory and highly prejudicial photographs.

G. Bunch's constitutional rights were violated by his inability to conduct effective cross-examination of the pathologist.

H. Bunch was denied the constitutionally guaranteed effective assistance of counsel because:

i. trial counsel failed to conduct an adequate *voir dire* of prospective jurors;

ii. trial counsel failed to object to portions of the Commonwealth's opening statements which were irrelevant and improper;

iii. trial counsel's opening statement was ineffective;

iv. trial counsel failed to object to irrelevant, inadmissible testimony;

v. trial counsel failed to object to portions of the Commonwealth's cross-examination of petitioner which were clearly improper and irrelevant;

vi. trial counsel failed to preserve for appellate and collateral review the adequacy of the Indiana search warrant;

vii. trial counsel failed to object to the admission of the gun on the grounds that it had not been positively identified as belonging to petitioner;

I. Bunch's constitutional rights were violated by the denial of a fundamentally fair trial.

II. Sentencing Phase

A. Bunch was denied his constitutionally guaranteed right to the effective assistance of counsel because:

i. trial counsel failed adequately to prepare and present evidence at the sentencing phase of trial;

ii. trial counsel failed to object to the jury instruction given in the sentencing phase of trial and failed to offer other appropriate instructions;

iii. trial counsel failed to request a ruling on the future dangerousness issue prior to the sentencing hearing;

iv. trial counsel failed to object to the emphasis on future dangerousness testimony during the Commonwealth's presentation in closing argument.

B. Bunch's constitutional rights were violated by the admission of irrelevant character evidence.

C. Bunch's constitutional rights were violated when the jury heard evidence of future dangerousness, a fact later excluded from jury consideration.

D. Bunch's constitutional rights were violated by the inadequate and confusing instructions given to the jury.

E. Bunch's constitutional rights were violated when he was sentenced to death based on insufficient evidence of a statutory prerequisite to the death penalty.

F. Bunch's constitutional rights were violated when he was denied a fundamentally fair sentencing trial.

G. The Virginia death penalty statute and sentencing procedures are facially unconstitutional.

H. The Virginia death penalty statute was unconstitutionally applied to the facts of this case.

I. The Virginia death penalty statute is applied in an arbitrary and discriminatory manner.

J. The death penalty constitutes cruel and unusual punishment.

K. The penalty of death by electrocution is unnecessarily cruel and unusual.

III. Appellate Phase

Bunch's constitutional rights were violated by the Virginia Supreme Court's failure to conduct a meaningful proportionality review.

IV. State Habeas Corpus Phase

Bunch's constitutional rights were violated by the exclusion of relevant admissible evidence in the state habeas corpus proceeding.

The Court will address each of these contentions in turn.

II.

I. A. Bunch first contends that the confession made upon his return to Virginia from Japan was obtained in violation of his Fifth Amendment right to counsel. He argues that he asserted his right to counsel in Japan and that when the police resumed interrogating him before he had spoken with counsel and without Bunch initiating the conversation, they violated his Fifth Amendment rights under *Edwards v. Arizona*, 451 U.S. 477 (1981). The trial court, finding that Bunch asserted his right to counsel in Japan, suppressed the statements he made in Iwakuni. The court declined, however, to suppress the Virginia confession, finding under the totality

of the circumstances a valid waiver of Bunch's right to counsel. Bunch argues that *Edwards* established a *per se* rule forbidding a finding that a suspect waives his right to counsel unless, after his request for an attorney, he initiates any subsequent interrogation. Bunch argues that under this *per se* rule the Virginia confession is inadmissible.

Respondent argues that Bunch made, at most, only an ambiguous, equivocal reference to a lawyer, and so did not assert his right to counsel during questioning in Japan. Respondent further alleges that the vagueness of Bunch's comment allowed further questioning in order to ascertain whether he in fact desired to confer with counsel. Finally, respondent claims that Bunch reinitiated the conversation with the officers, thereby allowing those officers to engage in further interrogation. This Court finds it unnecessary to address these issues. Assuming, *arguendo*, that Bunch did make a valid request for counsel in Japan and that officer Cahill reinterrogated Bunch in Virginia before Bunch was provided counsel, the Court may still find that no Fifth Amendment violation occurred to render the statements in Virginia inadmissible. At the time of Bunch's arrest and trial, the character of the *Edwards* rule was at best ambiguous. That ambiguity was not resolved until later, when in *Solem v. Stumes*, 465 U.S. 638, 647 (1984), the Supreme Court first described the rule of *Edwards* as a "*per se*" rule. Because the Virginia Supreme Court applied a plausible interpretation of the *Edwards* rule in the Bunch appeal, and because the later modification of the *Edwards* rule should not be applied retroactively to Bunch's case, this Court finds that the state courts properly applied the "totality of the circumstances" test to find a valid waiver of Bunch's right to counsel. The waiver being valid, Bunch's Fifth Amendment rights were not violated, and his statements made in Virginia were properly admitted.

Before the *Edwards* decision, a waiver of the right to counsel was examined based upon the "totality of the

circumstances." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Waiver after an accused had specifically invoked his right to counsel required "a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depend[ed] in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Edwards*, 451 U.S. at 482 (quoting *Johnson*, 304 U.S. at 464). In *Edwards*, the Court implied for the first time that additional safeguards were necessary when an accused requested counsel. The Court held that

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85.

Justice Powell concurred in the result in *Edwards* but refused to join the court's opinion because he was "not sure what it mean[t]." *Id.* at 488 (Powell, J., concurring). The *Edwards* opinion stated the familiar *Johnson v. Zerbst* standard for waiver. What concerned Powell, however, was the emphasis *Edwards* placed on "initiation." Powell was unsure whether *Edwards* created "a new *per se* rule, requiring a threshold inquiry as to precisely who opened any conversation between an accused and state officials." *Id.* at 489-90. This possibility troubled Powell because such a rule would "superimpose a new element of proof on the established doctrine of waiver of counsel." *Id.* at 490.

The Supreme Court did little to clarify matters when, the year after *Edwards*, it issued an opinion in *Wyrick v. Fields*, 459 U.S. 42 (1982). In *Wyrick*, the Supreme Court reversed and remanded an Eighth Circuit opinion where the majority had "misconstrued this Court's recent decision in *Edwards v. Arizona* and imposed a new and unjustified limit on police questioning of a suspect who voluntarily, knowingly, and intelligently waive[d] his right to have counsel present." *Id.* at 43 (citation omitted). The Court did not address Justice Powell's concern about the meaning of "initiation," as it was conceded that the suspect in *Wyrick* had initiated the interrogation. *Id.* at 46. The opinion also did nothing to clarify whether or not *Edwards* had stated a *per se* rule forbidding waiver where further interrogation was not suspect-initiated. Instead, the Court's language simply added to the confusion. The Court stated that "[t]he Eighth Circuit recognized that what *it called* the 'per se rule' of *Edwards* 'does not resolve the issue present here,' " *id.* (emphasis added), adding that "[t]he only plausible explanation for the court's holding is that, encouraged by what *it regarded* as a *per se* rule established in *Edwards*, it fashioned another rule of its own." *Id.* at 48 (emphasis added). The *Wyrick* opinion made no attempt to characterize the *Edwards* rule as a *per se* rule and reiterated the fact that *Edwards* "emphasize[d] that the *totality of the circumstances, including the fact that the suspect initiated the questioning*, is controlling." *Id.* (emphasis added). Finally, the Court held that "[b]ecause the Court of Appeals misapplied *Edwards* and *created an unjustified per se rule*," *id.* at 49 (emphasis added), the case would be remanded. After the issuance of the *Wyrick* opinion, the meaning of the *Edwards* rule was still ambiguous.

The confusion that *Edwards* and *Wyrick* created was not confined to Justice Powell's chambers. In 1983 the Supreme Court decided *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). Justice Powell wrote a concurring opinion

in which he documented the confusion in the lower courts over whether *Edwards* had announced a new *per se* rule. *Id.* at 1047 n.1 (Powell, J., concurring). Powell's concurrence noted that Justice Marshall and the three Justices who joined Marshall's *Bradshaw* dissent read *Edwards* differently than Justice Rehnquist and the three Justices who joined the Rehnquist opinion. While all viewed "the 'initiation' question as the first step of a two-step analysis, the second step being the application of the *Zerbst* standard that require[d] examination of the 'totality of the circumstances,'" *id.* at 1048, the two sides disagreed over the meaning of "initiation." *Id.* Full clarification of the *Edwards* rule was still lacking.

The Supreme Court of Virginia decided *Bunch* on June 17, 1983, six days before the United States Supreme Court decided *Bradshaw*. The state supreme court refused to hold that the Virginia confession should have been suppressed, deciding that "*Edwards* did not establish, as Bunch seems to suggest, a per se rule forbidding any finding of waiver of counsel unless subsequent interrogation is suspect-initiated." *Bunch*, 255 Va. at 433, 304 S.E.2d at 276. The court based its decision on its view that in *Edwards* the Supreme Court "ha[d] not ruled that the only way a suspect may waive the right to counsel at a subsequent interrogation is by initiating the interrogation himself," *id.*, and went on, using the totality of the circumstances test, to determine that Bunch had made a knowing and intelligent waiver of his right to counsel in Virgina. The court sustained the admission of the confession on alternate grounds by finding that Cahill's inquiry whether Bunch "felt he was ready to sit down and go over the case" was only an attempt to see if Bunch had changed his mind about wanting an attorney, and "did not amount to police-initiated interrogation within the meaning of *Edwards*." *Id.* at 434-35, 304 S.E.2d at 277. Here, the Virginia Supreme Court relied on Powell's statement that "police legitimately may inquire whether a suspect has changed his

mind about speaking to them without an attorney." *Edwards*, 451 U.S. at 490 (Powell, J., concurring). Both of Powell's concerns, the existence of a *per se* rule in *Edwards* and the ambiguous use of the term "initiation," surfaced in the *Bunch* decision, and the Virginia Supreme Court addressed these issues in a manner compatible with then prevailing law.

The Supreme Court did not adequately clarify its *Edwards* rule until it decided *Solem v. Stumes*, 465 U.S. 638, a case decided after Bunch had exhausted his direct appeal. The *Solem* opinion was the first occasion where the Court stated that the *Edwards* rule was a "*per se* approach." *Id.* at 647. In fact, in a later case, *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (emphasis in original), the Supreme Court cited *Solem*, not *Edwards*, for the proposition that "*Edwards* set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel." (emphasis in original). At the time of Bunch's trial and direct appeal, the rule in *Edwards* remained ambiguous.

Bunch's statements in Virginia were obtained in strict accordance with established law in Virginia in 1982. The Virginia Supreme Court found a knowing and intelligent waiver of counsel under the totality of the circumstances. The Court noted that it could "conceive of no clearer case of a 'knowing and intelligent relinquishment or abandonment' of [*Miranda*] rights." *Bunch*, 225 Va. at 434, 304 S.E.2d at 277 (quoting *Wyrick*, 459 U.S. at 47). The Court's holding is adequately supported by the law and the record and will not be disturbed in this federal collateral proceeding unless the *Edwards* rule, as eventually clarified in *Solem*, must be applied retroactively.

Solem, the very case which clarified the rule in *Edwards v. Arizona*, refused to apply *Edwards* retroactively. *Solem*, 465 U.S. at 650. In *Solem*, the Supreme Court set forth the criteria controllir retroactive application of judicial decisions:

> Under these cases, "[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Id. at 643 (quoting *Stovall v. Denno*, 388 U.S. 293, 297 (1967)). The Court stated that retroactive effect is most fitting "where a new constitutional principle is designed to enhance the accuracy of criminal trials," *Solem*, 465 U.S. at 643, and that the *Edwards* rule was "a far cry" from such a case. *Id.* at 645. The Court further noted that the reliance interest in *Edwards* was compelling and that retroactive application of the rule would disrupt the administration of justice. *Id.* at 649-50. The Court concluded that *Edwards* should not be applied retroactively, and stated that, "[a]t a minimum, nonretroactivity means that a decision is not to be applied in collateral review of final convictions." *Id.* at 650. The Supreme Court's reasoning applies with equal force in the present case. If the *Edwards* rule itself has no retroactive effect during collateral review, then neither should a subsequent clarification of that rule be applied retroactively.

The Supreme Court has refused to apply other modifications of the *Edwards* rule retroactively. The Court recently held that *Arizona v. Roberson*, 486 U.S. 675 (1988), a case applying *Edwards* limitations on interrogation in the context of a separate criminal investigation, would not be applied retroactively on collateral review. *Butler v. McKellar*, 58 U.S.L.W. 4294 (U.S. Mar. 5, 1990) (No. 88-6677). This opinion affirmed the Fourth Circuit's decision in *Butler v. Aiken*, 864 F.2d 24, 25 (4th Cir. 1988), which held that the *Edwards-Roberson* limitations on police interrogation would not be applied retroactively because they had only "the most tangential relationship to truth finding." The Supreme Court stated that the *Roberson* rule was not a new procedure central

to an accurate determination of guilt or innocence, and reasoned as follows:

> Because a violation of *Roberson*'s added restrictions on police investigatory procedures would not seriously diminish the likelihood of obtaining an accurate determination—indeed, it may increase that likelihood—we conclude that *Roberson* did not establish any principle that would [require its retroactive application].

McKellar, 58 U.S.L.W. at 4297.

The Supreme Court's refusal to apply *Edwards* retroactively and its similar treatment of the *Roberson* limitations on police interrogation indicate that Bunch is not entitled to retroactive relief. The Supreme Court waited until the *Solem* decision to announce that *Edwards* created a *per se* rule. This aspect of the *Edwards* rule does not enhance the accuracy of criminal procedure or aid the truthfinding process. As the Court reasoned in *Butler v. McKellar*, such a rule does not meet the criteria for retroactive application on collateral review.

Because Bunch's Virginia confession was validly admitted under the law in existence during his trial and appeal, and because subsequent modification of the *Edwards* rule should not be given retroactive effect, this Court finds that the Virginia confession was properly admitted into evidence. Its inclusion does not afford Bunch a basis for relief.

Bunch also asserts in claim I.A. that the trial court should have suppressed his confession because he asserted his right to remain silent in Japan, and the Commonwealth did not scrupulously honor the right as required by *Michigan v. Mosley*, 423 U.S. 96 (1975). Respondent moves to dismiss this claim as procedurally barred because Bunch failed to raise it at trial or on appeal. *See Murray v. Carrier*, 477 U.S. 478 (1986); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Bunch responds that he pre-

served the right to challenge the admissibility of his confession on Fifth and Sixth Amendment grounds. In his assignments of error on direct appeal, Bunch included the following: "The Trial Court erred in denying Plaintiff in Error's Motion to Suppress His Confession." Brief for Appellant at 14, *Bunch*, 225 Va. 423, 304 S.E.2d 271 (No. 822081). Although Bunch mentioned *Mosley* in his appellate brief, he did not assert that the confession violated his right to remain silent. *Id.* at 15. Other circuits have allowed habeas corpus petitioners to present arguments not raised on direct appeal. *See, e.g., Vela v. Estelle*, 708 F.2d 954 (5th Cir. 1983), *cert. denied*, 464 U.S. 1053 (1984); *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983), *cert. denied*, 470 U.S. 1059 (1985) (allowing petitioners in each case to present instances of ineffective assistance of counsel not raised on direct appeal).

The Fourth Circuit, however, has barred certain claims of ineffective assistance of counsel under the Sixth Amendment as procedurally defaulted while allowing others to go forward. *See Whitley v. Bair*, 802 F.2d 1487, 1496 n.17 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987). Had the Fourth Circuit adopted Bunch's desired approach, defense counsel could have preserved all objections simply by making one blanket objection under each particular constitutional amendment and bringing up the others later during federal habeas corpus proceedings. Obviously, the Fourth Circuit would not accept Bunch's argument, because in *Whitley* it allowed some of the petitioner's Sixth Amendment claims, while barring others. As the Fourth Circuit observed in *Clanton v. Muncy*, 845 F.2d 1238, 1240 (4th Cir.), *cert. denied*, 485 U.S. 1000 (1988), "constitutional litigation is not to be conducted piecemeal, claims should be raised earlier rather than later, and considered resolution by state courts is far preferable to a last minute dash to federal habeas corpus." Bunch's claim of violation of his right to remain silent is not cognizable in this Court be-

cause it was not raised at trial or on appeal. *Murray*, 477 U.S. 478; *Wainwright*, 433 U.S. 72.

I.B. Bunch contends that his statements should have been suppressed because they were made involuntarily. In his appellate brief, Bunch states that if the right to counsel had not been violated, "there would be no doubt as to voluntariness." Brief for Appellant at 16. Thus, Bunch challenged the voluntariness of his confession only as it related to the lack of counsel. For the reasons stated in the above discussion of the right to remain silent, this issue is barred under the rules of *Whitley*, 802 F.2d 1487, *Murray*, 477 U.S. 478, and *Wainwright*, 433 U.S. 72.

I.C. Bunch alleges that his conviction was based upon insufficient evidence of a murder during the commission of a robbery. Specifically, Bunch contends that the evidence was insufficient to prove beyond a reasonable doubt that the intent to steal preceded the murder. Bunch argues that because Ms. Thomas was unconscious and probably dead when he decided to steal her property, the evidence supports charges of murder and larcency rather than murder and robbery. The Virginia Supreme Court considered and rejected this challenge on direct appeal. *Bunch*, 225 Va. at 439-40, 304 S.E.2d at 280-81. The holding that as a matter of Virginia law robbery can occur after a victim has died is not appropriate material for federal habeas corpus review because it involves no federal constitutional issue. *See Hailey v. Dorsey*, 580 F.2d 112, 115 (4th Cir. 1978), *cert. denied*, 440 U.S. 937 (1979).

On federal habeas corpus review, the evidence supporting a state court conviction is sufficient when, reviewed "in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). There was abundant evidence justifying the Virginia Supreme Court's finding that the intent to steal

preceded the murder of Ms. Thomas. Bunch told Cahill that he killed Ms. Thomas "because she was a slut and she reminded him too much of his wife and he wanted her money." *Bunch*, 225 Va. at 440, 304 S.E.2d at 280. Bunch testified at trial that he removed the victim's rings after he shot her and before he hanged her. Medical evidence indicated that Ms. Thomas may have remained alive when the robbery occurred. *Id.* Clearly, a rational trier of fact might have found the essential elements beyond a reasonable doubt. Thus, sufficient evidence exists to infer that Bunch formed the intent to steal before he committed the murder.

I.D. Bunch argues that the trial court erred when it failed to exclude two potential jurors for cause. Two veniremen, Butler and Hines, answered "yes" to the question, "Do you feel that regardless of the facts and circumstances in every case of murder that the death penalty should be imposed?" Both veniremen, however, changed their answers upon immediate re-questioning. Butler stated that she could impose a sentence of less than death and was not irrevocably committed to voting for the death penalty; Hines indicated that he misunderstood the phrasing of the question and that he would not impose death penalty in every case. Bunch's counsel removed Butler with a peremptory strike, but Hines served on the jury. Bunch argues that both should have been excluded for cause based upon their original answers.

This claim is not cognizable because objection was not raised at trial or on appeal. *Murray*, 477 U.S. 478; *Wainwright*, 433 U.S. 72. Bunch argues that this procedural default should not prevent review in the case of a fundamental miscarriage of justice. *Wainwright*, 433 U.S. at 91. Butler and Hines both indicated that they were not irrevocably committed to imposing the death penalty. Thus, it does not appear that there was a fundamental miscarriage of justice in not excluding them for cause.

I.E. Bunch argues that he was denied a fair trial because of Lynn Rider's testimony for the Commonwealth that two weeks before the murder, Bunch proposed that the two of them rob a Pizza Hut. On direct appeal, Bunch argued that the testimony was inadmissible because it was too remote in time from the events surrounding the murder. Bunch now challenges this testimony as being prejudicial and introduced only to show his propensity for crime. On direct appeal, Bunch "concede[d] that evidence of other crimes is admissible to show the motive, intent, and knowledge of an accused." *Bunch*, 225 Va. at 437, 304 S.E.2d at 279. Clearly, Rider's testimony is relevant to Bunch's intent to rob Thomas. Bunch now attempts to question the issue on federal habeas corpus. Because he failed to raise this claim at trial or on appeal, his attempt is barred under *Murray*, 477 U.S. 478, and *Wainwright*, 433 U.S. 72.

I.F. The trial court permitted the introduction into evidence of two photographs of Thomas, both of which Bunch now challenges. One showed Thomas as she was found, hanging from the doorknob. The other was a black and white facial photograph of Thomas on the autopsy table. The first photograph was not challenged at trial or appeal. Accordingly, consideration of that claim is precluded under *Murray*, 477 U.S. 478, and *Wainwright*, 433 U.S. 72. Respondent argues that the autopsy table photograph was necessary for identification because it was the only photograph available giving a frontal view of Thomas. Bunch contends that the photograph was inflammatory and prejudicial.

Appraisal of the probative and prejudicial value of evidence is entrusted to the sound discretion of the trial court and will not be disturbed absent extraordinary circumstances. *United States v. MacDonald*, 688 F.2d 224 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983). The Supreme Court of Virginia found no abuse of the trial court's discretion. *Bunch*, 225 Va. at 436-37, 304 S.E.2d at 278. The finding that the photograph was admissible

for identification was soundly within the trial court's discretion, and there are no extraordinary circumstances which justify disturbing that finding.

I.G. During trial, Bunch requested that the court provide him with funds to hire a pathologist to aid in the cross-examination of the Commonwealth's pathologist. The court refused the request. Bunch contends that this refusal violated his Sixth Amendment right to cross-examine witnesses and his Fourteenth Amendment rights to due process and equal protection. This claim is not technically exhausted because it was not presented to the Virginia Supreme Court on direct appeal and it was not raised during any phase of the state habeas corpus process. The Court finds that any further attempts at exhaustion would be futile. *See Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975) (state habeas review is barred by failure to raise issue at trial and direct appeal). This claim is barred from federal collateral review by *Murray*, 477 U.S. 478, and *Wainwright*, 433 U.S. 72.

I.H. Bunch presents seven claims of ineffective assistance of counsel during the guilt phase of his trial. It appears that several of these claims may not have been exhausted in the state proceedings; however, the Court finds that at this time any other attempts at exhaustion would be futile. *See Greenfield v. Robinson*, 413 F. Supp. 1113, 1115-16 (W.D. Va. 1976); *see also*, 28 U.S.C. 2254(b); Va. Code Ann. § 8.01-654(B)(2) (1984).

Bunch failed to present allegations I.H.vi and I.H.vii (contained in paragraphs 56 and 57 of his habeas corpus petition) to the state trial court. The facts underlying these claims were known to Bunch at the time he filed his state petition. Because these claims were known but not raised, they would be unavailable to Bunch in a second state habeas proceeding. Va. Code Ann. § 8.01-654(B)(2). Bunch's failure to present these claims properly in state court bars their consideration in this federal pro-

ceeding. *Murray*, 477 U.S. 478; *Wainwright*, 433 U.S. 72.

Bunch presented allegations I.H.i, I.H.ii, I.H.iii, I.H.iv and I.H.v (located in paragraphs 51 through 55 of the petition for habeas corpus) to the state habeas court. They were not, however, raised during the habeas appeal to the Virginia Supreme Court. Accordingly, these allegations are procedurally barred under the rule of *Whitley v. Bair*, 802 F.2d 1487.

I.I. Bunch claims that his constitutional rights were violated by the denial of a fundamentally fair trial at the guilt phase of the proceedings. In paragraph 59 of his petition, Bunch alleges several instances of the trial court's failure to insure the fairness of the process. Allegation (b), that the court improperly restricted voire dire by defense counsel, was not raised on direct appeal and is accordingly barred from review in federal habeas corpus proceedings. *Murray*, 477 U.S. 478; *Wainwright*, 433 U.S. 72.

Claim (a) asserts that the trial court erred by failing to suppress all of Bunch's statements to police investigators which were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). This Court has previously reviewed the Virginia Supreme Court's finding that it could "conceive of no clearer case of a 'knowing and intelligent relinquishment or abandonment' of [*Miranda*] rights." *Bunch*, 225 Va. at 434; 304 S.E.2d at 277 (*see* I.A., *supra*). The Court finds that the Virginia Supreme Court's holding was clearly supported by the law and the record, and thus finds that the claim requires no further response.

Allegations (c) and (d) charge that the trial court erred by qualifying jurors Butler and Hines after they indicated that they would always impose the death penalty. These claims are discussed in I.D., *supra*, and are held to be meritless.

Allegation (e) states that the trial court erred by admitting into evidence an inflammatory photograph. Discussion of this claim appears in I.F., *supra*; the Court finds no merit in this allegation.

Claim (f) asserts that the trial court erred in admitting testimony which related to Bunch's character and was not relevant to the issue of his intent to rob the victim. A discussion of this claim occurs at I.E., *supra*; this allegation is also without merit.

In allegation (g), Bunch charges that the trial court erred by allowing the defendant to be cross-examined in a manner which was clearly improper and prejudicial. The scope of cross-examination is ordinarily a question of state law and is therefore not cognizable in federal habeas corpus proceedings. *See, e.g., Moore v. Illinois*, 408 U.S. 786 (1972); *Grundler v. North Carolina*, 283 F.2d 798 (4th Cir. 1960). The nature of the cross-examination at issue does not compel an exception to this rule. The Supreme Court of Virginia found that Bunch had "opened the door" concerning the testimony in question and held that the trial court did not abuse its discretion. *Bunch*, 225 Va. at 438, 304 S.E.2d at 279-80. This Court will not disturb that holding.

Finally, in claim (h), Bunch alleges that the trial court erred in failing to grant all of his requests for statements made by witnesses. This claim is also meritless. Only material containing exculpatory evidence is constitutionally required to be provided to a defendant. Absent such material, the defendant has no constitutional right to the names of witnesses or to their statements. *Weatherford v. Bursey*, 429 U.S. 545 (1977).

The Court now turns to Bunch's allegations concerning the sentencing phase of his trial.

II.A. Bunch claims that his counsel's assistance was ineffective during the sentencing phase of his trial. Allegation II.A.(i) charges that Bunch's trial counsel were

ineffective because they failed adequately to prepare and present any evidence of Bunch's character, background or emotional state other than testimony from his mother, Mrs. Claghorne. According to Bunch, counsel failed to identify, contact and evaluate other witnesses, including Bunch's sisters, his father, his brother-in-law, his high school principal, his friends from Indiana and his ex-wife. The state court held a plenary hearing on this issue. Bunch's case consisted of affidavits from friends and relatives. Affidavits from Bunch's sisters and brother-in-law stated that he related well to his siblings during childhood and was not then known to be violent, that his father drank excessively and was abusive, and that Bunch had been upset over the breakup of his marriage. Bunch's school principal and school friends indicated that he had not been a major discipline problem and confirmed his poor relationship with his father and his unhappiness during the separation from his wife. Family friends' affidavits repeated these themes and indicated that Bunch had used marijuana during high school. Bunch's uncle discussed Bunch's bad relationship with his father, his mental state prior to the murder, and his use of alcohol and drugs during high school. This information was echoed in the affidavit supplied by Bunch's paternal grandmother. Finally, Bunch's father stated that he had not been close to his son, had had little contact with him, and that Bunch was a relatively quiet child.

In addition to the above affiants, defense counsel had access to Dr. Showalter, a psychiatrist who had evaluated Bunch at the beginning of the case. Counsel interviewed Dr. Showalter, reviewed his findings, and made a tactical decision that evidence he would give would do more harm than good to Bunch's case. Accordingly, he was not called as a witness. Counsel gave similar consideration to testimony which could have been elicited from Bunch's ex-wife.

Neither Bunch nor his parents indicated that Bunch's sisters would be helpful witnesses. Bunch's counsel were

at 691. Counsel's actions were reasonable, informed and strategic in light of the circumstances. Accordingly, this claim is without merit.

Bunch's remaining claims of ineffective assistance of counsel are procedurally barred. Claims II.A.(ii) and II.A.(iv) were not raised at all during the state habeas corpus proceedings. Further state court action would be fruitless, as these claims would be barred by Va. Code Ann. § 8.01-654(B)(2). The claims are barred from federal collateral review by *Murray*, 477 U.S. 478, and *Wainwright*, 433 U.S. 72. Bunch raised allegation II.A.(iii) during the state trial level habeas process but did not include it in his appeal to the Virginia Supreme Court. Review at the federal level is accordingly barred under the holding of *Whitley v. Blair*, 802 F.2d 1487.

II.B. In claim II.B, Bunch states that his constitutional rights were violated by the admission of irrelevant character evidence during the sentencing phase. At the sentencing phase, the Commonwealth utilized evidence from the guilt phase concerning Bunch's association with prostitutes and his desire to kill various people. The Court also admitted evidence that Bunch desired to be a mercenary or a Mafia hit man. Bunch claims that this evidence did not relate to Ms. Thomas' murder and was therefore irrelevant; he contends that its admission violated his constitutional rights. Counsel offered no objection to this evidence when it was admitted. Bunch therefore defaulted under Virginia's contemporaneous objection rule. *See Russo v. Commonwealth*, 207 Va. 251, 148 S.E.2d 820, 825 (1966), *cert. denied*, 386 U.S. 909 (1967). The issue is accordingly procedurally barred on federal habeas corpus review. *Murray*, 477 U.S. 478; *Wainwright*, 433 U.S. 72; *see Satterfield v. Zahradnick*, 572 F.2d 443 (4th Cir.), *cert. denied*, 436 U.S. 920 (1978) (claims of error defaulted under state contempo-

raneous objection rule are not cognizable in federal habeas corpus proceedings absent showing of cause and prejudice.

II.C. Allegation II.C. charges that Bunch's constitutional rights were violated when the jury heard evidence of future dangerousness, a factor which was later excluded from their consideration. Again, no objection to this evidence was voiced when it was admitted. Petitioner therefore defaulted under the contemporaneous objection rule, and federal review is barred under *Murray*, 477 U.S. 478, and *Wainwright*, 433 U.S. 72.

II.D. Bunch claims in allegation II.D. that his constitutional rights were violated by the inadequate and confusing instructions given to the jury. First, Bunch argues that the court's instruction outlining the jury's task in the sentencing phase was illogical and confusing and that it failed to channel the jury's discretion. Bunch failed to object to this instruction during trial or on appeal. Accordingly, his claim is now procedurally barred. *Murray*, 477 U.S. 478; *Wainwright*, 433 U.S. 72.

Bunch raises several claims concerning the failure to instruct the jury on mitigating circumstances and the failure to instruct the jury that it must find beyond a reasonable doubt that death was an appropriate sentence under the totality of the circumstances. Bunch failed to preserve these claims on direct appeal. Because they were not properly preserved, these claims are now procedurally barred. *Murray*, 477 U.S. 478; *Wainwright*, 433 U.S. 72.

Similarly barred are Bunch's complaints about the jury form and the trial court's refusal to instruct the jury concerning the possibility of parole. In so holding, the Court notes that although these claims were not technically exhausted, further attempts at exhaustion would be futile. *See Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680.

The only claims concerning jury instructions which Bunch preserved on direct appeal were those regarding

the trial court's denial of his proposed instructions A, B and C. These instructions would have reminded the jury that proof of an intentional killing alone could not establish the aggravating circumstances required by Virginia's death penalty statute. The proposed instructions also sought to define the statutory predicates of torture, depravity of mind, and aggravated battery for the jury.

Bunch argues that the instructions given failed to guide the discretion of the jury in considering the aggravating circumstances. Virginia law states that a death sentence shall be imposed only when one or two statutory aggravating circumstances, either the "dangerousness" or the "vileness" circumstance, is established beyond a reasonable doubt. *See* Va. Code Ann. § 19.2-264.4(c)(1983). The death sentence may be imposed based on vileness only when the jury finds the defendant's act "was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." *Id.* A finding of torture, depravity of mind, or aggravated battery is a prequisite to a finding of vileness. *Turner v. Commonwealth*, 221 Va. 513, 526, 273 S.E.2d 36, 44-45 (1980), *cert. denied*, 451 U.S. 1011 (1981). The jury need not set forth, however, the specific statutory predicate upon which it relies. *Clark v. Commonwealth*, 220 Va. 201, 213, 257 S.E.2d 784, 791-92, *cert. denied*, 444 U.S. 1049 (1980).

Bunch first argues that the trial court erred when it failed to instruct the jurors that they must unanimously agree about which vileness predicate existed. He argues that this failure opens the possibility that some jurors may have found the crime involved depravity, while others may have based their finding on aggravated battery. The Court finds this argument to be without merit. Petitioner cites no authority for the proposition that Virginia jurors must receive a unanimity instruction regarding the statutory predicates to vileness, and, indeed, there is none. When polled, the jury members indicated

the finding of vileness was unanimous. The jurors' affirmance "that their verdict was unanimous moots any claim of error in the instructions on unanimity." *Briley v. Bass*, 742 F.2d 155, 166 (4th Cir.), *cert. denied*, 469 U.S. 893 (1984). The remainder of Bunch's arguments concerning aggravating circumstances have been previously addressed to the Fourth Circuit, and they have been rejected. *See (James D.) Briley v. Bass*, 750 F.2d 1238, 1242-46 (4th Cir.), *cert denied*, 470 U.S. 1088 (1984); *(Linwood E.) Briley v. Bass*, 742 F.2d at 1165-66. Accordingly, his claims are without merit. The instructions given by the trial court in this case were adequate to guide the discretion of the jury in considering aggravating circumstances.

II.E. Bunch asserts in allegation II.E. that his constitutional rights were violated when he was sentenced to death based on insufficient evidence of vileness. The Supreme Court presented the standard to be applied to claims of insufficient evidence raised during federal habeas corpus review in *Jackson v. Virginia*, 443 U.S. 307. The reviewing court must sustain the state court's findings if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in original).

The present case contanis ample evidence of both aggravated battery and depravity of mind, two of the statutory predicates to a finding of vileness. In support of the aggravated battery element, a Dr. Beyer offered evidence that Ms. Thomas did not die immediately, but instead survived for at least an hour after the shooting. The evidence concerning the path of the bullet allowed the reasonable inference that Bunch lied about shooting her from behind, and that Ms. Thomas may have known that Bunch was going to shoot her. Additional evidence of battery appears in the evidence that Bunch used Ms. Thomas' scarf to hang her from a doorknob after shooting her.

There is also abundant evidence supporting a finding of depravity of mind. Evidence of premeditation was presented, as was evidence that Bunch contemplated killing someone and chose Ms. Thomas. He told friends that he desired to be a Mafia hit man because it would be interesting. Bunch had a sexual orgasm when he killed Ms. Thomas; as she was dying, Bunch turned on the stereo, drank wine, and went through her belongings. He testified that his feelings of euphoria continued while he hanged Ms. Thomas from a doorknob. Bunch admitted the murder had thrilled him and he would have killed some prostitutes if he had remained in the area. Finally, Bunch never expressed any remorse whatsoever.

Based upon the above evidence, a rational trier of fact could easily have found that Bunch's actions displayed the vileness necessary to sustain a capital sentence. His claim to the contrary is meritless.

II.F. Bunch claims that his constitutional rights were violated when he was denied a fundamentally fair sentencing trial. The issues identified in his petition are without merit and have been addressed previously (*see* I.I., *supra*). Bunch's sentencing trial was fundamentally fair and his claim will accordingly be denied as meritless.

II.G. Bunch asserts that Virginia's death penalty statute and sentencing procedures are facially unconstitutional. The Court addressed that issue directly in *Stamper v. Baskerville*, 531 F. Supp. 1122 (E.D. Va. 1982). In *Stamper*, the petitioner was convicted of capital murder and sentenced to death by electrocution. On federal habeas review petitioner Stamper argued that Virginia's death penalty statute, Va. Code Ann. § 19.2-264.2, was unconstitutional on its face. The Court held that the claim was "clearly without merit." *Id.* at 1128. In support of its conclusion, the Court pointed out that the Supreme Court had held the first aggravating factor

of an identical statute to be constitutional in *Jurek v. Texas*, 428 U.S. 262, 276 (1976). The second aggravating factor was approved in *Gregg v. Georgia*, 428 U.S. 153, 201 n.51 (1976). *Stamper*, 531 F. Supp. at 1128. Bunch cites *Godfrey v. Georgia*, 446 U.S. 420 (1980), in support of his argument that Virginia's death penalty statute is unconstitutionally broad and vague. In *Godfrey*, the Supreme Court did not find the statute it had upheld in *Gregg* to be constitutionally defective. What the Court found unconstitutional was the vagueness of the judge's instructions concerning the application of the statutory criteria. *Id.* at 431-33. That case is clearly distinguishable from the present one. The trial court's instructions in this case regarding the statute avoid any constitutional infirmities akin to those found in *Godfrey*. *See Stamper*, 531 F. Supp. at 1129-31.

II.H. In allegation of II.H., Bunch claims that Virginia's death penalty statute was unconstitutionally applied to the facts of this case. Bunch failed to raise this claim at trial or on appeal and it is therefore procedurally barred. *Murray*, 477 U.S. 478; *Wainwright*, 433 U.S. 72.

II.I, II.J. and II.K. Allegation II.I. charges that Virginia's death penalty statute is applied in an arbitrary and discriminatory manner; allegation II.J. claims that the death penalty constitutes cruel and unusual punishment; and allegation II.K. charges that the penalty of death by electrocution is unnecessarily cruel and unusual. These claims are forfeited on two levels. First, none of the arguments were raised at trial or on appeal and they are therefore procedurally barred under *Murray*, 477 U.S. 478, and *Wainwright*, 433 U.S. 72. Aditionally, although the claims were presented in the state trial court habeas proceeding, they were not raised on state habeas appeal and are therefore defaulted under the rule of *Whitley v. Blair*, 802 F.2d 1487.

III. In allegation III, Bunch charges that his constitutional rights were violated when the Virginia Supreme Court failed to conduct a meaningful proportionality review. This claim presents no federal question. Virginia state law requires a comparative proportionality review. Va. Code Ann. § 17-110.1(C). As the Fourth Circuit has stated, however, "such a comparative review is not constitutionally mandated." *Roach v. Martin*, 757 F.2d 1463, 1482 (4th Cir.), *cert. denied*, 474 U.S. 865 (1985) (citing *Pulley v. Harris*, 465 U.S. 37 (1984)). Some type of meaningful review is constitutionally required as protection against arbitrary outcomes. *Id.* The Virginia Supreme Court's discussion of its review in this case reveals a constitutionally adequate approach. The court collected the records of cases pursuant to Va. Code Ann. § 17-110.1(E) and determined that

> the vileness of [Bunch's] offense, as exemplified by the aggravated battery he committed upon Thomas and the depravity of mind with which he executed the crime, at least equals any vileness we have encountered in other cases, including those cited by Bunch.

Bunch, 225 Va. at 450, 304 S.E.2d at 286.

Bunch's claim will be rejected, as this Court finds no federal constitutional deficiency in the Virginia Supreme Court's decision.

IV. Petitioner's final allegation is that his constitutional rights were violated by the exclusion of relevant, admissible evidence at the state habeas corpus proceeding. As the Fourth Circuit stated in *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988), "claims of error occurring in a state post-conviction proceeding cannot serve as a basis for federal habeas corpus relief." Accordingly, this claim is not cognizable.

Because it appears to the Court that Bunch is not entitled to habeas corpus relief on the claims set forth in

his petition, the petition must be dismissed. An appropriate Order shall issue.

/s/ James R. Spencer
United States District Judge

Date: 16 Mar. 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 88-0645-R

TIMOTHY DALE BUNCH,
Petitioner,

v.

CHARLES E. THOMPSON, WARDEN,
Respondent.

ORDER

[Filed Jun. 4, 1990]

This matter is before the Court on petitioner's motion to alter or amend the judgment of this Court entered on March 16, 1990. For reasons stated below, the motion will be DENIED.

I

Petitioner Timothy Dale Bunch moves for amendment of this Court's opinion on three grounds. First, Bunch contends that the rule announced in *Edwards v. Arizona*, 451 U.S. 477 (1981), was never ambiguous and that the language of *Edwards* clearly compels the suppression of his statements made in Virginia. Second, Bunch argues that even if courts were divided over the proper interpretation of the *Edwards* rule, Virginia law had clearly adopted the *per se* approach, and the Virginia Supreme Court ignored this precedent when deciding Bunch's case. Finally, Bunch claims that this Court's opinion flatly contradicts the holding of *United States v. Renda*, 567 F. Supp. 487 (E.D. Va. 1983), *aff'd mem.*, 758 F.2d 649 (4th Cir. 1985).

Petitioner has failed to convince this Court that its analysis of the state of the *Edwards* rule as of June of 1983 was incorrect. The *Edwards* decision left the lower courts substantially uncertain as to whether initiation of communications by a suspect in custody who had invoked the right to counsel was an essential predicate to a finding that he later made a knowing, intelligent, and voluntary waiver of that right. The Supreme Court did not definitely resolve this issue so that no lower court could reasonably hold to the contrary, until *Solem v. Stumes*, 465 U.S. 638 (1984), confirmed that the *Edwards* rule was indeed a *per se* rule. Justice Powell's concurring opinion in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), documents the confusion in the lower courts at the time of Bunch's trial and direct appeal. *See id.* at 1047 n.1 (comparing seven decisions holding that *Edwards* established a *per se* rule with five contrary decisions).

The *per se* approach was certainly within the logical compass of the *Edwards* opinion; its applicability was ultimately confirmed in *Solem*. But in June of 1983, the existence of a *per se* rule was susceptible to debate among reasonable minds. The conflicting lower court decisions bear witness to this fact. The Supreme Court held in *Teague v. Lane*, 109 S. Ct. 1060, 1070 (1989) (emphasis in original), that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." Because prior to the *Solem* decision it would not have been an illogical application of *Edwards* to decide that the case did not establish a *per se* rule, *Solem* announced a "new rule." *See Butler v. McKellar*, 110 S. Ct. 1212, 1217-18 (1990).

A new rule is applied retroactively on collateral review only if it fits within one of two recognized categories. The first exists where the rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 109 S. Ct. at 1075 (quoting *Mackey v. United*

States, 401 U.S. 667, 692 (1971) (separate opinion of Harlan, J.)). That category is clearly inapplicable where, as here, the proscribed conduct is capital murder. *See Butler*, 110 S. Ct. at 1218. The second category concerns new procedures "central to an accurate determination of innocence or guilt," those "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 109 S. Ct. at 1076. This category is also inapplicable. The Supreme Court has refused to apply the *Edwards* rule retroactively because it does not enhance the accuracy of criminal trials. *Solem*, 465 U.S. at 644-45. For the same reason, the Supreme Court held that the rule announced in *Arizona v. Roberson*, 486 U.S. 675 (1988), a case applying *Edwards* limitations on police interrogation in the context of a separate criminal investigation, would not be given retroactive effect. *Butler*, 110 S. Ct. at 1218. The reasoning in these cases also applies to Bunch's situation. The absence of a *per se* rule would not seriously diminish the likelihood of an accurate conviction. The rule announced in *Solem* should not be applied retroactively.

Petitioner's argument that the decision in this case was inconsistent with existing Virginia law is also unconvincing. When Bunch's case was decided, Virginia had not adopted a *per se* rule under which a court first had to determine that an accused initiated a post-counsel-request colloquy, and only then could consider whether there had been a voluntary waiver under the totality of the circumstances.

Bunch claims that Virginia law recognized the *Edwards per se* rule even before the *Edwards* decision. He relies upon two cases, *LaBonte v. Commonwealth*, 217 Va. 677, 232 S.E.2d 738 (1977), and *Pearson v. Commonwealth*, 221 Va. 936, 275 S.E.2d 893 (1981). Both *LaBonte* and *Pearson* concern the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966). In *LaBonte*, the Virginia Supreme Court found a valid waiver of the right to coun-

sel. It also gave examples of situations where valid waivers might exist, none of which were analogous to the facts of Bunch's case. *See LaBonte*, 217 Va. at 679, 232 S.E.2d at 739. Bunch argues that because this *dictum* regarding waiver contains no reference to his own situation, a finding that he waived his right to counsel is erroneous. This argument is without merit. The *Pearson* opinion held that the Commonwealth failed to meet its burden of demonstrating a knowing and intelligent waiver. *Pearson*, 221 Va. at 944, 275 S.E.2d at 898. There is no indication that this finding required an initial determination of who initiated the conversation among Pearson and the officers. Neither of the two cases upon which Bunch relies adopts a *per se* rule. Both are applications of *Miranda*, and as the Supreme Court recognized in *Solem v. Stumes*, 465 U.S. at 647 n.7, "*Miranda* did not adopt a *per se* rule with regard to waiver of the right to counsel."

Bunch also relies on two Virginia cases decided after *Edwards*: *McFadden v. Commonwealth*, 225 Va. 103, 300 S.E.2d 924 (1983), and *Simmons v. Commonwealth*, 225 Va. 111, 300 S.E.2d 918 (1983). Again, neither of these cases directly addresses whether or not *Edwards* established a *per se* rule. Both cases distinguish *Edwards* because the statements in issue were made to investigators other than those who had heard the demand for counsel and because the statements concerned cases other than those in which the accused invoked the right to counsel. *McFadden*, 225 Va. at 110, 300 S.E.2d at 927; *Simmons*, 225 Va. at 121, 300 S.E.2d at 923. Nothing in these cases indicates a modification of the approach established in *Johnson v. Zerbst*, 304 U.S. 458 (1938), for assessing the validity of waivers. In *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271, *cert. denied*, 464 U.S. 977 (1983), the Virginia Supreme Court interpreted *Edwards* as affirming the *Johnson v. Zerbst* "totality of the circumstances" approach. In reaching its determination, the court considered the *McFadden* and *Simmons* cases and

cited them as authority. *See Bunch*, 225 Va. at 433-34, 304 S.E.2d at 276-77.

Finally, Bunch contends that this Court's opinion contradicts the holding of *United States v. Renda*, 567 F. Supp. 487. *Renda*'s recognition of a *per se* rule is not inconsistent with this Court's holding that the Virginia Supreme Court applied a plausible interpretation of *Edwards* in Bunch's case. The analysis in *Renda* relied heavily on *Oregon v. Bradshaw*, 462 U.S. 1039, decided six days after the Virginia Supreme Court denied Bunch's appeal. The *Renda* opinion does not hold that the presence of a *per se Edwards* rule was "dictated" or no longer susceptible to debate among reasonable minds at the time of Bunch's trial and direct appeal.

II

Bunch has failed to convince this Court that its opinion in his case was incorrect. Accordingly, his motion to alter or amend the Court's judgment entered on March 16, 1990, is hereby DENIED.

And it is SO ORDERED.

/s/ James R. Spencer
United States District Judge

Date: 4 Jun. 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 88-0645-R

TIMOTHY DALE BUNCH,
Petitioner,

v.

CHARLES E. THOMPSON, WARDEN,
Respondent.

FINAL ORDER

[Filed Mar. 16, 1990]

For the reasons stated in the accompanying memorandum opinion, respondent's motion to dismiss is hereby GRANTED and the petition is DISMISSED.

And it is SO ORDEDED.

/s/ James R. Spencer
United States District Judge

Date: 16 Mar. 1990